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AN EXAMINATION OF THE GOVERNOR IN COUNCIL'S DIRECTION-MAKING AND REVIEW POWERS WITH RESPECT TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION'S AUTHORITY TO REGULATE BROADCASTING AND TELECOMMUNICATIONS IN CANADA

by

MARTIN ROMANOW

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1984

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Supervisor

Date: October 11th, 1984

ABSTRACT

The focus of this paper is to set out and examine the direction-making and review powers of the Governor in Council as they relate to the CRTC. The CRTC has been a truly independent administrative agency regulating broadcasting and telecommunications in Canada, but as a result of the escalating use of the Cabinet review powers, the CRTC's independence is being threatened. Unless steps are taken to either abolish the Cabinet appeal process or develop methods to allow for procedural protections, the independence of the CRTC is in jeopardy.

The evolution of the doctrine of "fairness" has been instrumental in allowing for the expansion of judicial review of administrative tribunals, but under the common law, it has not expanded to allow for the review of exclusively legislative functions, such as the Cabinet review of CRTC decisions. Consequently, the Charter of Rights and Freedoms is discussed to illustrate its affect on the direction-making and appeal powers of Cabinet and to suggest that it will result in procedural protections being instituted into the process.

The Charter is also viewed in relation to some of the procedures and functions of the CRTC, which, after reviewing, have been found not to infringe significantly on the protections guaranteed in the Charter.

This paper also examines the constitutional set

up for broadcasting and telecommunications in Canada, not only to provide background for the discussion on communications, but to review the jurisdictional issue, for it has become one of the contentious issues of our day in federal-provincial relations. Primarily because of the interprovincial nature of broadcasting and telecommunications, the paper concludes that both services are more suited to fall within the sphere of federal authority.

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TABLE OF CONTENTS

CHAPTER		PAGE
	INTRODUCTION	1
1	AUTHORITY OVER BROADCASTING AND TELECOMMUNICATIONS	5
	1. Constitutional Authority over Broadcasting and Telecommunications	5
	2. Broadcasting	9
	(a) Provincial Arguments for Jurisdiction in Broadcasting	17
	(i) Closed-Circuit Cable Systems	18
	(ii) The Content of Broadcasting	24
	(iii) Overlapping Jurisdiction of Broadcasting	25
	(iv) Educational Broadcasting	26
	(b) Municipal Jurisdiction	29
	3. Regulation of Telecommunications in Canada	32
	4. The Constitutional Jurisdiction over Telecommunications	37
	(a) A Two Tiered System for Regulation of Telecommunications	41
	(i) Two Distinct Services - Local and Long Distance	41
	(ii) Concurrent Regulation	43
	(iii) POGG	44
	(b) The CNCP-AGT Interconnection Application	46
	(c) Telecommunications Reform	50
	(d) Conclusion	54
	5. The Regulatory Authority of the CRTC over Broadcasting and Telecommunications	55
	(a) Broadcasting	55
	(b) Telecommunications	59
2	THE CRTC AS AN INDEPENDENT ADMINISTRATIVE AGENCY	72
	1. Introduction	72
	2. The Governor in Council's Power to Issue Directions and to Review CRTC Action	82
	(a) The Governor in Council's Direction Power	83

(i) Statutory Provisions 83
(ii) Directions under s.22(1)(a) 84
(iii) Commentary 88
(b) Cabinet Appeals - The Governor in Council's Power to Review or Set Aside 92
(i) Procedure 92
(ii) Statutory Provisions for Cabinet Appeals 96
(iii) Is the Cabinet an Appropriate Tool for Review? 99

3. Is there Political Accountability for Government Activity? 103

4. Examples of the Governor in Council's Review of CRTC Decision-Making 108
(a) The Manitoba Cable Agreement 109
(b) The Telesat-TCTS Agreement 114
(c) The TCTS Rate Inquiry 118
(d) The Limiting of Rate Increases to 6 and 5% 122
(e) Pay Television 124

5. Conclusion 126

3 JUDICIAL REVIEW OF CABINET DECISIONS 144

1. "Fairness" - Background 144
(a) The Duty to Act Fairly 148

2. Does "Fairness" Apply to the Governor in Council? 154

3. Grounds for Review of Cabinet Decisions 163
(a) Jurisdiction 163
(b) Function 166
(c) Procedural or Substantive Issue? 167
(d) Individual versus the General Public 167

4. The Charter of Rights and Freedoms and the Governor in Council's Decision-Making 170

4 THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 182

Introduction 182

1. Section 1 182
(a) Reasonable 185
(b) Prescribed by Law 186
(c) Demonstrably Justified in a Free and Democratic Society 190

2. The Canadian Content Quotas 191
(a) Background 192
(b) Do the Content Regulations Violate the Charter? 200
(i) Prima Facie Violation 200
(ii) Demonstrably Justified in a Free and Democratic Society 200
(iii) Prescribed by Law 203
(iv) Reasonable Limit 206
(c) Section 15 211

3. Section 7 214
(a) Security of the Person 214
(i) Property 215
(b) Fundamental Justice 220
(i) Procedural 223
(ii) Substantive 225
(c) Procedural Fundamental Justice 235

4. Examples of the Charter's Impact 237

(a) Directives 237
(b) Canadian Content 241
(c) CRTC Procedures 241
(i) Cross-examination 242
(ii) Collegial Decision-making 245
(iii) Confidentiality of Documents 250
(iv) Evidence Under Oath 251

CONCLUSION 266

BIBLIOGRAPHY 269

LIST OF CASES 278

LIST OF STATUTES 281

APPENDIX 282

INTRODUCTION

For nearly two decades the Canadian Radio-television & Telecommunications Commission (CRTC) has been the cornerstone for the development of communication laws and policy in Canada, primarily because of its far-reaching mandate and independent status to pursue its objectives. In recent years though, the Governor in Council (Cabinet) has begun to review and overturn some CRTC decisions with increasing frequency. By doing so Cabinet caught the attention of the Canadian public, for its actions have been seen as a direct challenge to the independent status of the CRTC.

The focus of this paper is to set out and examine the procedures available to Cabinet to oversee CRTC activities, namely Cabinet's direction-making and review and appeal powers. The use of these two powers is explored by reviewing specific instances where directions were issued and the appeal power used to overturn CRTC decisions.

In order to adequately discuss the topic, considerable background information is required. The constitutional authority to govern broadcasting and telecommunications is discussed in some detail. Not only does the constitutional background set the stage for understanding the CRTC's power and activities, but the constitutional issue in itself is such a contentious one in Canada today that it merits more than a cursory

analysis. Since the provinces have been striving to expand on their powers whenever possible, the topic of communications has been ripe for recent federal-provincial negotiations.

Furthermore, to assess the Governor in Council's direction and review powers in today's legal climate, it is essential to consider the application of the Canadian Charter of Rights and Freedoms.[1] But to leave discussion of the Charter exclusively with these powers would have been remiss considering the dearth of literature scrutinizing the Charter's affect on communications law. Consequently, an examination of the Charter's impact on other aspects of CRTC functions and its procedures is undertaken.

Therefore, the thesis is essentially broken down into three main areas: the constitutional set up for broadcasting and telecommunications in Canada; Cabinet's control over the CRTC's independence; and the effect of the Charter on aspects of communications.

Chapter one initially reviews the scope of federal jurisdiction over broadcasting and the principal arguments put forth by the provinces in attempting to assume power in the area. Then the jurisdictional set up and provincial arguments for telecommunications is

---

[1] Part I of the Constitution Act, 1982, enacted by the Canada Act 1982, (U.K.), c. 11.

depicted. Since it appears that the courts may soon be making a final determination of the jurisdictional issue for telecommunications, the dispute which has brought it all to a head is studied. Finally, the chapter concludes with a review of the statutory provisions which provide the CRTC with its regulatory authority over both broadcasting and telecommunications.

In chapter two, the independent nature of the CRTC is documented, followed by a consideration of the statutory provisions allowing for the Governor in Council to issue directions and review CRTC decisions. Then examples of the Governor in Council's review of CRTC decisions are set out in order to reveal the extent of Cabinet's interference in the regulatory process.

Chapter three considers the feasibility of judicially reviewing Cabinet decisions. It documents the progression of the general duty of "fairness" as it relates to the review of decisions of administrative tribunals, and then examines the doctrine's applicability to decisions of the Governor in Council. Since courts have taken it upon themselves to occasionally permit review of Cabinet decisions, the general grounds upon which review has been based are briefly discussed. The chapter concludes by examining whether the Charter will allow greater review of Cabinet decisions.

The final chapter explores the Charter in more detail. Following a fundamental discussion of sections 1 and 7 of the Charter, the Canadian content quotas; the direction-making power; and various CRTC procedures for conducting hearings and making decisions are inspected in light of the Charter.

CHAPTER 1

AUTHORITY OVER BROADCASTING AND TELECOMMUNICATIONS

The purpose of this segment of the paper is to review the constitutional set up for both broadcasting and telecommunications; to signify areas where provincial control is or might be operable within the federally dominated scene; and then briefly to review the salient powers of the CRTC as the federal regulatory agency over broadcasting and telecommunications.

Even though federal jurisdiction monopolizes broadcasting and telecommunications, the provinces manifest a sufficient interest in these areas that allowance could be made for joint or concurrent control. In view of the doctrine of paramountcy, any overlap in jurisdiction would result in federal authority prevailing, therefore, it is not suggested that there be exclusive provincial jurisdiction, but it is advocated that concurrent control could be accommodated in various aspects of the broadcasting and telecommunications fields.

The term "broadcasting" has been used to refer to television, radio and cable TV systems while "telecommunications" refers to telephone, telegraph and data transmission systems.

1. CONSTITUTIONAL AUTHORITY OVER BROADCASTING AND TELECOMMUNICATIONS

When discussing the constitutional jurisdiction

over broadcasting and telecommunications several factors have been decisive in determining authority. First of all, s.92(10) of the Constitution Act, 1867[1], allows for exclusive provincial jurisdiction for:

> "Local Works and Undertakings other than such as are of the following Classes:
> (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province."

It is s.92(10)(a) which has been the primary statutory provision allowing for federal jurisdiction.

Since the terms "works" and "undertakings" have been pivotal in all the broadcasting and telecommunications decisions, they warrant explanation. "Works" have been described as physical things which have a separate and distinct existence. An "undertaking" is "not a physical thing, but is an arrangement under which...physical things are used."[2] It is an organization or an enterprise directed towards the provision of a specific and unified service.[3]

When an undertaking has extended beyond the boundaries of a province, it has been classified as an interprovincial undertaking. As cases discussed later indicate the physical works do not actually have to extend beyond the limits of a province, the undertaking

is a connecting one if the basic service provided extends beyond the province.[4]

Two other factors are relevant. There must be a physical connection of some sort, plus a common operation, or a co-operative arrangement must exist.[5] Once these two factors are found to exist, the operation will likely be held to be within federal jurisdiction.

The local work or system must physically connect with the interprovincial undertaking either by transmitting electromagnetic radiation through the air or by hard-wire connections between a transmitter and receiver.

If accomplished through the air, signals can be transmitted via a line-of-sight terrestial microwave communication system, which simply means that the receiver and transmitter must be in a straight visual sighting line of each other and relay the signal from transmitter to transmitter. This has been the traditional method used for radio and TV broadcasting.[6] With advances in technology, one can also employ satellites to receive the radiation at a specified frequency from earth stations (up-link frequency) then reinforce the signal and transmit it back to earth on a different frequency (down-link frequency).[7]

If the method chosen to transmit signals is by a hard-line wire connection, it means that a cable is used to transmit the broadcasting signals received either via conventional methods or satellite, to subscribers' homes.[8]

The third element necessary to find an interconnecting undertaking is that there must be a common operation or arrangement between entities to provide service. The entities can be commonly owned or separately owned, but a financial link for the cost of the service should exist to indicate the co-operative effort.

The pre-eminent case referred to and followed in all of the cases dealing with interconnecting undertakings was A.G. for Ontario v. Winner. In Winner an interprovincial bus service also picked up and discharged passengers intraprovincially. The province attempted to regulate the intraprovincial aspect of the service. The Privy Council held that the service was a single, indivisible undertaking subject to federal control. Dual authority could only be possible if there were two distinct enterprises operating, one within the province and one of a connecting nature. Since the local aspect was completely dependent on the interprovincial

service, the same busses carried both local and long distance passengers, it was a connecting undertaking.[9]

The notion of "interconnection" or "connecting undertaking" has been discussed to determine jurisdiction for broadcasting or telecommunications, but the arguments are more directly applicable to the sphere of telecommunications because the nature of a telecommunications system provides a better illustration for the concept of interconnection than broadcasting does as a result of it being more clearly severable into local and long distance aspects. Since the jurisdictional issue for telephones has not been determined recently, further discussion of the case law relating to interconnection will be undertaken when discussing the constitutional jurisdiction over telecommunications. However, it must be kept in mind that all the arguments relating to interconnection are just as applicable to broadcasting as they are to telecommunications, especially when considering the notion of non-broadcasting services employing cable as a means of distribution.

2. BROADCASTING

The Constitution Act, 1867, makes no reference whatsoever to broadcasting or telecommunications [other

than "telegraphs" in s.92(10)(a)] consequently from the earliest cases up to the present day, courts have decided jurisdictional issues by analogy to established precedent. It is proposed that by reviewing the progression of cases in broadcasting, one is able to see that since the Radio Reference, the inclusion of radiocommunications within federal jurisdiction has been adhered to religiously and has gone almost unquestioned whenever the jurisdiction was at issue in subsequent cases. Even though technologies have changed since the Radio Reference, its logic has been sustained throughout all subsequent cases involving broadcasting.

The earliest and most prominent case dealing with broadcasting was Re Regulation and Control of Radio Communications (the Radio Reference) which determined whether the Parliament of Canada had jurisdiction to regulate and control radiocommunication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves. The Privy Council decided in favour of federal control over radiocommunication and over the apparatus that transmits and receives it because they ascertained that Canada was a signatory to the International Radiotelegraph Convention of 1927, therefore, the Dominion was competent

to pass legislation implementing the treaty. Since the matter was not explicitly within s.91 of s.92 of the Constitution Act, 1867, the implementation of the treaty was within the jurisdiction of Parliament as being within the opening words of s.91 assigning the Dominion the power to make laws for the "peace, order and good government" (POGG) of Canada.[10]

Their Lordships also found that broadcasting could be considered "telegraphs" and a connecting undertaking within s.92(10)(a). Along with finding federal jurisdiction, their Lordships specified that the system was not able to be separated for jurisdictional purposes because,

> "Once it is conceded...that the transmitting instrument must be...under the control of the Dominion, it follows that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver.[11]

Thus, the Radio Reference conclusively established exclusive federal jurisdiction over broadcasting and programming received by air. The next step was to determine whether the transmission by cable of programmes received by antennae, was a distinct and separate business within the jurisdiction of the provinces. In Re Public Utilities Commission and

Victoria Cablevision Ltd., an antenna picked up signals and distributed them via cable to subscribers. The Public Utilities Commission requested information concerning the operation, but the cable company refused to comply with their request. They alleged that their operation was within exclusive federal jurisdiction under s.92(10)(a).[12]

The court established that the cable merely extended the range for transmitting programmes and as such was an integral part of the undertaking controlled by the Dominion; whether the signals received by antennae were transmitted by air or by cable was immaterial there was only a single undertaking which fell within federal competence.[13]

Re C.F.R.B. and Attorney General of Canada[14] was the first case attempting to challenge federal control by alleging that the content of programming was distinct from the signal and physical means of broadcasting. The station was charged with broadcasting a programme of a partisan character respecting an election on the day preceding the election, in contravention of s.28(1) of the Broadcasting Act.

It was held that exclusive legislative authority of Parliament extends to the control and

regulation of the intellectual content of radio communication. The court reasoned that it was not practical or logical to give regulation and control over the carrier system to Parliament and then deny them control over the only reason for the existence of the carrier system, the transmission and reception of intellectual material.[15] Furthermore, the court stated that radiocommunication had attained such dimensions as to affect the state of Canada and, therefore, was exclusively within the authority of Parliament under the POGG power.[16]

In Capital Cities Telecommunications Inc. v. CRTC, a broadcaster in Buffalo, New York challenged the CRTC decision to allow Rogers Cable TV Ltd. to delete their commercial messages and substitute them with public announcements. In finding that the CRTC was acting within its jurisdiction, Chief Justice Laskin confirmed that the Radio Reference had been correctly decided under s.91 and s.92(10)(a).[17] He indicated there was no doubt that federal authority extends to the regulation of the reception of signals from outside Canada and to their transmission within Canada. The separation of authority cannot be accomplished simply because signals are intercepted and transmitted to ultimate viewers through

cable.[18] Also, the regulation of programme content was held to be inseparable from the regulation of the undertaking itself.[19]

The court emphasized that the decision did not determine the question of jurisdiction over programming of local origin transmitted on cable entirely within provincial boundaries because those facts were not before the court.[20]

In The Public Service Board v. Dionne,[21] the Quebec Public Service Board had authorized individuals to operate a cable distribution undertaking in specific areas. The programming was either picked up from the air or created by the undertaking itself and distributed via cable to subscribers. Since the operation was locally situated and limited to subscribers in Quebec, it was alleged that the operation was essentially a local work or undertaking within provincial competence under s.92(10).

The Supreme Court of Canada rejected this argument and found that for television broadcasting and receiving there cannot be a separation for constitutional purposes between the carrier system, the physical apparatus and the signals received and carried. The issue that needed to be resolved was, what is the nature

of the service provided, not through which means the signal is distributed.[22] Since television signals from within and without the province were used, the operation was broadcasting, therefore, within federal jurisdiction. The reliance on broadcasting stations to supply some of the programming resulted in the cable being merely another method of reaching private television sets.[23]

Furthermore, the actual percentage of original programming used to the programmes received from broadcasts was immaterial, once any programming from broadcasts was employed, the operation fell within federal jurisdiction.[24]

As in Capital Cities, the court stressed that the facts did not deal with local cable enterprises limited exclusively to locally produced programmes, consequently no decision was being rendered on that situation.[25]

It is quite clear from all of the above that a local undertaking which has an interconnecting aspect to it, will fall under federal control. In Capital Cities, even though the cable company's works were local, the operation was held to be a connecting undertaking because it used radio signals from across the border. Similarly

in Dionne, the court looked at the actual service provided and determined that it was receiving and transmitting television signals and as such was an indivisible undertaking within federal jurisdiction.[26] It was significant that separate entities contributed to the provision of the same service; there was only a single undertaking and since the undertaking was involved in broadcasting, it was subject to federal control.[27]

As is evident, the bulk of authority holds that even separate entities or functions will be found to be part of a single undertaking if they contribute to the same service or fulfillment of the same purpose. Where the service provided is broadcasting, then federal jurisdiction dictates.[28]

In conclusion, federal jurisdiction over broadcasting has been based on the following factors.

1. According to Radio Reference, jurisdiction is founded on the POGG power and the exception to provincial power in s.92(10)(a). These two powers are sufficient that it has been suggested that virtually all existing facets of the broadcasting and telecommunication industries are potentially subject to federal jurisdiction under them.[29]
2. Any use of a signal determined to be under federal

control places the entire operation under federal control. In other words, if a broadcasting signal is functionally integrated into an activity, federal authority presides (Victoria Cable) and even using only a small portion of programmes from a broadcast signal subjects the entire undertaking to federal regulation (Dionne).

3. The regulation of content is inseparable from the undertaking itself (Re C.F.R.B. and Capital Cities).

(a) Provincial Arguments for Jurisdiction in Broadcasting

Arguments for provincial control in the area of broadcasting have been founded on the following sections of the Constitution Act, 1867:

1. s.92(10), local works and undertakings;
2. s.92(13), property and civil rights;
3. s.92(16), matters of a local or private nature, and;
4. s.93, jurisdiction over education.

Even though the broadcasting field appears to be completely cloaked with federal jurisdiction and the arguments above have not met with significant success in the past, it is suggested that there are still several areas left in broadcasting that have not been assigned

specifically to federal jurisdiction; however, they are the only openings left for possible accommodation of provincial interests.

(i) Closed-Circuit Cable Systems

Capital Cities and Dionne held that Parliament had exclusive jurisdiction over cable systems receiving signals and transmitting them via cable to subscribers, but they specifically left open the question of jurisdiction over closed-circuit cable systems operating entirely within a province.[30] The fact that the court has been reluctant to redefine broadcasting and comment on the status of closed-circuit within the province, leaves open a viable argument for the provinces.[31] As such, conceivably if there is a physical delivery of videotapes or films to a cable operation (as opposed to over the airwaves) and distribution to subscribers within the province is entirely by cable, then the operation would be outside the parameters covered by the cases so far.

The matter of closed-circuit has not been decided by the courts, but it is suggested that if it is, it likely would not result in provincial control being assigned to it. The physical location of all facilities and means of operation within a province would not be

relied upon too heavily as being the determining factor for jurisdiction to override federal control because of the limitations set out earlier, namely: an interconnecting undertaking almost automatically becomes federal jurisdiction; any use of a broadcasting signal brings the matter within federal jurisdiction (functional integration); and the courts are reluctant to separate the content of programming from the carrier system.

For example, difficulties may arise if the films have crossed a border or if programming is not entirely produced within the province.[32] Considering that most systems use a combination of satellite, conventional and locally produced programming, the feasibility of a closed-circuit operation necessarily requires that it be a small undertaking and may not properly be classified as a broadcaster in competition with federally licensed television and cable systems.

Another problem might be that a closed-circuit system could be classified as an interprovincial undertaking if the operation is necessarily incidental to or bears a rational and functional connection to a valid federal law, thereby making federal control necessary to effectuate broadcasting policies.[33]

As a result, even though the concept of a closed-circuit system initially appeared to allow for provincial control, upon closer examination, the economic viability of the system would be questionable for it would need to be completely local in nature (no interprovincial traffic of any sort) and of a small scale, so as not to be functionally connected to the federal system.

If a carrier did manage to set up a closed-circuit system that was not caught within any of the established criteria for federal jurisdiction, then one would need to question whether POGG could be used to find federal jurisdiction over a closed-circuit system within a province.

The POGG power was originally an emergency power only, but A.G. for Ontario v. Canada Temperance Federation[34] expanded its nature by finding that:

> "if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be a concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the Provincial Legislatures."[35] (referred to as the "national dimensions" test)

Accordingly, an Act prohibiting the sale of

intoxicating liquors was upheld as a valid federal concern under POGG.

POGG was relied upon in Re C.F.R.B. to find federal jurisdiction because it was necessary for the uniform control over broadcasting. It has been suggested that the court reasoning was insubstantial to find that radio communication had attained such dimensions as to fit into POGG, in that the court did not supply any reasons for its findings that broadcasting had attained national dimensions other than by drawing an analogy with aeronautics.[36] Reference was made to the case of Johannesson v. West St. Paul[37] where aeronautics had been found to satisfy the criteria for the "national dimensions" test for POGG, thereby placing it within the federal sphere of power.

It may be that the "national dimensions" test has been narrowed more to an emergency power again as a result of the Anti-Inflation Reference,[38] but in either event, whether the test is broad or narrow, it has been suggested that it is questionable whether POGG can be employed to justify federal control over a closed-circuit system entirely within a province. POGG would not be suitable because the provincial control would have to harm the nation or its neighbours in some manner for it

to be a matter of national concern.[39]

Is the broadcasting situation in Canada in such a state as to satisfy either the "emergency" test or the "national dimensions" test for POGG? According to the Department of Communication's scenario in their policy statement of March 1, 1983, the situation is urgent. It is their contention that broadcasting has an unprecedented power in all countries of the world, but in Canada, it is especially important because of the proximity to the United States and Canada's strong regional differences, to use the broadcasting system to maintain a national identity.[40]

The government is stressing that the danger exists that new technologies (e.g. direct broadcast satellites) could undermine the Canadian broadcasting system and with it, the nation's cultural integrity. In more tangible terms, jobs and the economic stability of the industy would be affected if steps are not taken to meet the challenge of increased foreign programming.[41] The Canadian broadcasting system is one of the finest in the world and should be protected from the challenges confronting it.[42]

If the situation painted by the government is accurate, then perhaps the test for POGG can be met,

enabling the federal government to acquire jurisdiction even over closed-circuit systems because of the necessity to control all aspects of broadcasting, to ensure successful implementation of policies aimed at remedying the urgent situation. If the situation is not as bleak as depicted, then the overriding effect of POGG is questionable.

Even though POGG has been used to justify federal jurisdiction over broadcasting in the past (Radio Reference and Re C.F.R.B.) little can be done to correct its use if it has been unwarranted; however, it likely would not be justified to expand its use to govern a closed-circuit provincially controlled system.

In practical terms, the POGG issue might never arise, because if the closed-circuit system is of substantial proportions, its programming (news and other programming similar to conventional broadcasting) would be caught in the federal net of the content being inseparable from the undertaking itself.

In conclusion, it is possible that the basic arguments for provincial jurisdiction [s.92(10), (13), (16)] could be employed in the future to suggest that there ought to be provincial jurisdiction over closed-circuit operations within a province, but for the

reasons outlined above, it is unlikely that they will be.

(ii) The Content of Broadcasting

The extension of federal jurisdiction over content of broadcasting has been criticized by some because it is proposed that the Radio Reference should only be recognized as giving Parliament jurisdiction to regulate the physical and non-physical components of the process of distributing communications.[43] As such, it is arguable that content can be separated from the system that conveys it for the purposes of jurisdiction.[44] The court's judgment in Capital Cities may have been coloured by the international aspects of the facts making federal jurisdiction more of a necessity, but using Radio Reference as authority to extend coverage over content may not have been proper, for it makes no reference to the issue of content.[45]

Constitutional and regulatory convenience militates in favour of federal jurisdiction over the process of broadcasting, but the arguments based on s.92(10)(a) and POGG do not necessarily stretch to cover content regulation.[46] However, even if these criticisms are well-founded and the decision to cover content is not justified, it is difficult to get around the effects of Capital Cities and it likely cannot be challenged.

(iii) Overlapping Regulation of Broadcasting

The case of Attorney-General of Quebec v. Kellogg's Co. of Canada,[47] provides another possible opening for provincial jurisdiction. In Kellogg's the Court examined the issue of whether provincial legislation regulating content of children's advertising infringed on the exclusive federal legislative power over broadcasting. The object of the regulation under the consumer protection legislation was to protect children from the harmful effects of advertising. There was no question that the province had jurisdiction to control advertising in the province intended for children, under s.92(13) and (16), but the issue was whether it could incidentally regulate content on television. It was held that the regulation did not seek to control broadcasters; it sought to control manufacturers from using a certain type of programming, therefore, the legislation was aimed at controlling the commercial activity of manufacturers. The effect of the legislative restriction on broadcasting content was only ancillary or incidental to otherwise valid provincial consumer legislation.[48]

Thus, in essence a province can acquire legislative interest and control over some broadcasting matters, if the legislative mechanism has been properly

constructed and if the doctrine of paramountcy does not bring it within federal control. As a result, the case opens up a possibility for the provinces to successfully intrude into areas of federal competence.[49]

It is suggested that a certain amount of overlap can be tolerated in the regulatory set-up to accommodate some provincial interests. The constitutional protection exists, that if the overlap is excessive, the doctrine of paramountcy would prevail to maintain federal authority.

(iv) Educational Broadcasting

The issue of jurisdiction over educational broadcasting provides an example of how jurisdictions may overlap, yet be tolerable and benefit the public if handled properly to accommodate both interests. But the two notions, educational broadcasting and overlapping jurisdiction, are different in that the primary focus for educational broadcasting is to set up a broadcasting system, but restrict the content purely to educational programming. With overlapping jurisdiction, as in Kellogg's, the primary focus is for another purpose, such as protecting children from advertising. The overlap into broadcasting is only incidental and not the focus of the provincial law.

By virtue of s.93, provinces have a reasoned claim to utilize the media for educational programming. The federal government has acknowledged that the provinces have an interest in educational broadcasting and has attempted to reconcile the federally ordained jurisdiction over the regulation of the airwaves and its content with the provincial interest to use the media for educational purposes.[50] For provincial jurisdiction over educational broadcasting, a distinction needs to be made between the means of transmission and the content of the transmission. In this particular case, the provinces might have authority to regulate the content, provided that it contains educational programming only. Given the availability of channels within the cable system, both interests can be accounted for without hardship or diminished responsibility for either party.

A first step was taken through a Cabinet directive in 1970[51] which required the CRTC to direct each cable operator to leave one channel open for educational purposes.[52] A second directive in 1972 resulted in broadcasting licences being issued to independent corporations in several provinces to operate television and radio stations to furnish educational opportunities.[53]

Certain problems have arisen with respect to the second directive. The CRTC has been concerned that the corporations may not be independent enough as they are controlled by the provincial Ministries of Education, while the provinces have disclosed concerns that if they are not controlled by the Ministries, then separate educational systems in competition with the existing system may develop in the provinces.[54]

Secondly, there is apprehension that the educational programming may develop into general entertainment programming. Since control over programming content has been assigned to Parliament, some compromise must be reached to allow provincial control over educational programming without giving them control over general content.[55]

A solution might be for the provinces to regulate the broadcast itself on the community channel, while federal jurisdiction would still control the transmission facilities.[56] Or, a closed-circuit system using only provincially produced educational programming could be used in limited geographic areas, as opposed to province wide distribution, to keep the operation outside of the judicially recognized guidelines for federal control.

In any event, an adequate solution has not yet been found, but since the federal government has recognized the provincial interest in using broadcasting in this limited capacity and has taken some steps to try and accommodate provincial concerns, a compromise is likely to be reached through federal-provincial negotiations rather than by constitutional amendment.

(b) Municipal Jurisdiction

All the arguments presented asserting provincial jurisdiction over broadcasting are equally applicable to any jurisdictional claims by municipalities. The by-law making power of municipal corporations is restricted to the authority given to them under provincial legislation, so any by-law must fall within the provincial powers in s.92 and not be designed to or in effect regulate broadcasting. But, the by-law can incidentally affect federal control over broadcasting if its primary purpose is to promote a valid provincial objective. For example, in City of Toronto v. Bell Telephone Co.,[57] the city could not prohibit Bell from operating or demanding that they seek permission from the city,[58] but they could regulate where to lay cables.

Since a broadcasting system (especially cable)

must have physical facilities to operate (lines, poles, etc.) some municipal input into regulating the operation is expected. A summary of areas which are open to municipal regulation are listed below. The summary, prepared by Peter Grant, is the best available on the subject and has been recognized, accepted and relied upon as an authorative statement of municipal jurisdiction over aspects of broadcasting.

> "1. A municipality cannot validly prohibit a federally-licensed CATV operator from commencing operation within the municipality, whether by a general prohibitory by-law or by setting up a licensing system which enables the council to refuse permission to an otherwise qualified applicant.
> (doctrine of paramountcy)
>
> 2. A municipality if given this authority by the province, can, however, set reasonable restrictions on the use of its highways by CATV operators and can probably enforce these restrictions by requiring the operator to obtain municipal permission before proceeding to construct his plant.
> (tolerable overlapping of jurisdiction)
>
> 3. The restrictions permitted to be imposed on the use of municipal highways, easements and airspace by CATV systems must be reasonably related to such matters as public safety, traffic control, maintenance and upkeep of the highway, and perhaps aesthetic value. The restrictions must not be unreasonable or discriminatory, but might include such requirements as:
>
> (a) the overall coordination of the work through the supervision of a

municipal official so that pole erection or plant construction can take place in conjunction with similar work by hydro or telephone companies.

(b) the prior notification and arrangement with municipal officials if or when traffic is to be stopped or impeded and the provision that this be done in accordance with local police requirements.

(c) the posting of a bond and/or the obtaining of liability insurance to ensure that the erection and maintenance is carefully done, and that no loss or injury be done to the public, and that whatever repairs are necessary to restore the street to a proper condition will be performed.

(d) safety restrictions (subject to any federal regulations on the question) requiring cables over streets to be a minimum height, or that poles be built within certain stress or construction standards, or that electrical outlets be properly grounded or protected.

(reasonable restrictions on municipal power)

4. Municipal restrictions or by-laws affecting CATV operators will probably be held to be inoperative if they

(a) affect subscriber rates or installation charges

(b) require an operator to use municipal utility commission poles (although if no other poles are in fact available, the operator may find himself obliged to negotiate for their use out of economic necessity)

(c) require an operator to set aside one or more channels for municipal or educational use, or require other programming commitments;

(d) require an operator to provide service free to schools or other institutions;
(e) relate to the operation, management or ownership of the CATV undertaking - e.g. requiring local ownership or financing, or requiring ownership in the cable to revert to the town;
(f) make municipal permission conditional upon the execution of a contract between the operator and the municipality stipulating any of the above requirements."[59]

(reasonable restrictions on municipal power)

3. REGULATION OF TELECOMMUNICATIONS IN CANADA

The major telephone companies in Canada have been incorporated as individual province-wide entities, which developed as natural monopolies within each provincial territory (other than Bell Canada which services most of Ontario and Quebec).[60] They are all members of a consortium called Telecom Canada (formerly the Trans-Canada Telephone System). The tenth member of the consortium is Telesat Canada, Canada's only domestic satellite service.[61]

The purpose of the consortium is to provide and operate a national network for long distance telephone and data communication services across Canada, that allows each company's customers to benefit from the savings and efficiency flowing from the cooperative joint

action.[62] Since no single telephone company has the capacity to provide complete services to its customers, Telecom Canada is necessary to supply the interconnection.[63] Its national and fully interconnected system ensures uniform levels of service and uniform pricing for long distance telephone services across the country.[64]

Telecom Canada operates as a supplier's cartel in that it controls the production and price of the service and it provides a forum for coordinated control of the industry. As a result, any CRTC decision or decision of the Governor in Council which affects one of its members (e.g. Bell Canada), indirectly affects the operation of the whole.

Aside from Telecom Canada members there are numerous independent telephone companies in Canada. For example there are fifty-seven such operations in Ontario and Quebec. In addition, CNCP Telecommunications operates a parallel communications system to that of Telecom Canada which provides a national network of telegraph and data communication services in direct competition with Telecom Canada for these non-voice services.[65] CNCP is regulated by the CRTC.

A connecting agreement for all Telecom Canada

members sets out servicing standards, maintenance of the long distance network and the method for revenue sharing.[66] Separate agreements between the independent telephone companies and Telecom Canada members allows the independents to interconnect with Telecom Canada to gain access to their services and to provide for revenue sharing.[67]

The absence of a clear statement in the constitution as to the authority to regulate telecommunications has contributed to various entities regulating the telephone companies in Canada.[68] The assortment of federal, provincial and even municipal regulating authorities has developed more from historical accident than from any logical planning.[69]

The CRTC regulates Bell Canada; British Columbia Telephone Company; Terra Nova Telephone, which serves a portion of Newfoundland; and Telesat Canada. Bell and B.C. Tel. have been declared in their incorporating Acts to be works for the general advantage of Canada within s.92(10)(c) and as such are within federal jurisdiction.[70]

The scope of federal jurisdiction has resulted in the federal government having a disproportionate influence over the telecommunications industry for Bell

Canada and B.C. Tel together constitute about three-quarters of the telephones used in Canada. Considering that the CRTC also regulates CNCP and Telesat Canada, the federal influence over telecommunications is considerable.[71]

Most other provincial systems are regulated by their respective provincial Public Utilities Commissions. These include: Maritime Telegraph and Telephone; Island Telephone Company; New Brunswick Telephone Company; Newfoundland Telephone; Alberta Government Telephones; and Manitoba Telephone System.[72]

Saskatchewan Telecommunications is a crown corporation controlled by the Lieutenant-Governor in Council and has no regulatory agency to answer to.[73]

Independents in Ontario and Quebec are regulated by the Ontario Telephone Service Commission and The Quebec Public Services Board respectively, while independents in B.C. are controlled by the B.C. Motor Carrier Commission.[74]

With so many different regulatory authorities and both levels of government participating in policy making, it has been difficult to obtain uniformity in regulation.[75] But in spite of scant consistent policy to direct regulatory intervention, all jurisdictions provide

that the regulator is responsible for protecting its customers by ensuring good service at reasonable rates. Not only do they regulate rates, they often supervise major management decisions over expenditures or financing and approve interconnection with other companies.[76]

All the regulatory boards apply similar tests in evaluating the rates for their carriers: the rates must be fair and reasonable and must be offered on an equal basis to potential subscribers without unjust discrimination.[77] The regulatory agencies have interpreted this vague requirement to mean that the companies are permitted to earn enough revenues to cover all expenses plus a fair return on invested capital.[78]

Generally, governments and regulators have left telephone companies with the responsibility of making policy decisions themselves and they have responded by establishing a system that supplies universal service to their customers. Customers receive a complete range and quality of service at a relatively comparable price, no matter where they are in the province.[79] As a result, Telecom Canada rates are uniform across the country. When Telecom Canada decides to increase rates, each member files the rate increase with its governing agency either for approval or only for informational purposes.

Because of the system's interdependence and the obvious repurcussions on other jurisdictions, it is understandable that regulators have been reluctant to tamper with rate increases submitted to them for approval.[80]

As for Telecom Canada itself, it is not regulated either federally or provincially other than incidentally by the federal or provincial regulators requiring that the rates of their members be approved.

4. THE CONSTITUTIONAL JURISDICTION OVER TELECOMMUNICATIONS

The only case thus far which has considered the constitutional jurisdiction over telecommunications was City of Toronto v. Bell Telephone Co. In that case the City attempted to prevent Bell from constructing its telephone lines without city consent. The Privy Council held that Bell was under exclusive federal jurisdiction because in its incorporating Act its operations had been declared for the general advantage of Canada under s.92(10)(c),[81] and the local and long distance functions did not constitute separate and distinct undertakings for regulatory purposes. The telephone lines were considered part of one interprovincial undertaking and as such were included within the s.92(10)(a) sphere of federal

competence.[82]

Since Bell, no one has sought to challenge the existing federal jurisdiction. One reason for not upsetting the status quo has been not knowing whether its replacement would be as favourable, for it generally has been accepted that the system has worked well and the public has been satisfied with the services furnished.[83]

Since both federal and provincial regulators seem to have acquiesced in the current arrangement, there has not been any judicial approval for the provincially regulated telecommunications carriers.[84] Several disputes in the past could have challenged jurisdiction, but methods have always been devised to avoid a court determination of the issue.[85] However, the current CNCP-AGT dispute may not be resolved without a final determination of the constitutional issue concerning the regulation of telecommunications services in Canada. Details of the dispute will be discussed later.

The strongest argument for provincial competence for carriers is based primarily on s.92(10), "local works and undertakings," because essentially carriers are provincially incorporated companies established to provide telephone services primarily within the boundaries of a single municipality or

province; their administration is within the same boundaries; and the physical facilities are all within provincial boundaries. The question that needs to be answered is, is interconnection between telephone companies in different provinces sufficient to put them within federal jurisdiction under s.92(10)(a)?[86]

To reiterate, the concept of "interconnection" entails the undertaking of a service which extends beyond the limits of a province, that reveals a physical connection and a cooperative arrangement (financial arrangement) between separate or commonly owned entities.

In Luscar Colleries Ltd. v. McDonald, the Privy Council held that a privately owned railway line entirely within a province, but connected to CNR's interprovincial line was a s.92(10)(a) undertaking. It did not matter whether the line actually extended to the boundary, the fact that contracts between the parties permitted a free flow of traffic put the operation within federal jurisdiction.[87]

In Luscar all three elements are evident: there was a physical connection between the railways; there was a contractual arrangement; and the railway service extended beyond the limits of the province. Additional

support for the principle espoused in Luscar is found in the cases of Capital Cities, Dionne and Winner, all referred to earlier, which indicated that a local undertaking which has an interconnecting aspect to it will fall under federal control.[88]

The recent decision in Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279, dealt with whether the labour relations of a bus passenger service serving both Ottawa and Hull was subject to federal or provincial labour legislation. The issue to determine was whether the undertaking connected Ontario with Quebec or extended beyond the limits of Ontario in such a way as to bring the operation within s.92(10)(a).[89] Using Winner as precedent, the court concluded that in spite of the extraprovincial aspect (daily routes to Hull) being very small in relation to the whole public transportation system in operation, the Hull routes could not be severed from the entire operation as they were an integral part of it. As long as the extraprovincial operation was regular and continuous, it fell within s.92(10)(a) as an interprovincial undertaking.[90]

Even though the case involves a labour dispute, the approach taken to resolving the conflict is identical

to that suggested for telecommunications. Considering the regular and continuous nature of long distance telephone services provided by the regulated carriers, the case establishes additional authority for holding that telecommunication carriers be subject to federal jurisdiction.

(a) A Two-Tiered System for Regulation of Telecommunications

In spite of the interconnecting aspect several arguments have been put forth supporting a two-tiered regulatory format for federal and provincial regulation over the local and long distance operations of the current systems. The general tenet of the three arguments below points out that it is possible for provincial regulation over intraprovincial operations to survive and work in concert with federal control over the interprovincial aspect of telecommunications.

(i) Two Distinct Services - Local and Long Distance

It has been suggested that none of the cases above (Capital Cities, Dionne, Winner) had a strong and distinct local service completely able to survive on its own, therefore, they are distinguishable because a provincial telephone system can operate its local service completely separate to the long distance service. It is

capable of being separated into two distinct operations for regulatory purposes.[91]

One case provides authority for the proposition that a local operation can remain under provincial control even though it is interconnected with a federally regulated operation. In City of Montreal v. Montreal Street Rlwy., one of the railways was declared for the general advantage of Canada under s.92(10)(c) and the other was provincially regulated. Both operated entirely within Quebec and a dispute arose as to the exchange of traffic between the two lines. It was determined that the locally and federally regulated railways could co-exist, as long as there was cooperation between them.[92]

Even though this case refused federal jurisdiction notwithstanding a physical connection with the federally regulated railway and a contractual agreement providing for a free flow of traffic, it may not be as influential for provincial carriers as originally appears because both railways were local (one was not an interprovincial line) and the ownership and operation of the physical facilities were completely separated.[93]

In addition, it has been argued that the Bell

case should not allow federal jurisdiction over every interconnecting situation because the case is old and cannot account for changes in the industry. The current situation in Canada is that there are two separate undertakings for telephones, one local and the other interconnecting. Each system has different procedures for rates of calls; long distance calls are logged separately and there is separate billing for the two types of calls, therefore, it is possible to have them function independently. The Winner fact situation is clearly distinguishable because the local aspect could survive if the interconnecting aspect stopped.[94]

Furthermore, the courts have hinted at the propriety of a two-tiered regulatory scheme. The Privy Council in Winner commented that if the evidence had revealed two distinct enterprises, they might have accepted divided jurisdiction.[95]

(ii) Concurrent Regulation

A provincial law is not automatically ultra-vires simply because it incidentally affects a broadcasting undertaking (Kellogg's). The provincial regulation was allowed because there was no conflict with federal regulations. From this, one may conclude that concurrent regulation in the telephone industry is

feasible even with the regulation of a connecting undertaking.[96]

(iii) POGG

If some provincial regulation is to be feasible, then POGG cannot be used to encompass all spheres of telecommunications, it should be used sparingly and only in situations of real national dimensions and importance, so as to limit the expansion of federal jurisdiction.

It is suggested that telecommunications has not nor is it currently creating an emergency situation or one which demands national regulation, consequently POGG should not be used to encompass local concerns such as provincially regulated telephone systems. The actual workings of the industry already verify an ascertainable and natural boundary for provincial jurisdiction which does not infringe upon or harm federal concerns.[97]

In the end, the combined effect of these three arguments proposes that it is possible for two distinct legislative powers to regulate the intra and inter provincial aspects of the provincial telecommunications carriers, other than those already under federal control (Bell and B.C. Tel.).[98]

Irrespective of the arguments supporting a

separation of powers, one factor appears to be insurmountable. The fact that all provincial carriers are members of Telecom Canada suggests that the long distance service is integrally related to the overall service provided by each carrier, thus furnishing the necessary interrelationship between provincial carriers to be regarded as interconnecting undertakings.[99]

It is questionable whether an independently regulated local service would be economically viable and able to survive on its own. The cross-subsidy between long distance and local revenues is crucial for economic viability of telephone companies. For some, long distance revenues account for two-thirds of total revenue.[100] Given such, it is unlikely that the local service could sever its revenue ties and still continue to prosper. As a result, it is suggested that the local aspect is not as strong and separate as the arguments make it out to be.

Consequently, the combination of the integral relationship between the local and long distance services and the strong authority of Bell, which clearly indicates that local and long distance services cannot be separated for jurisdictional purposes, allows one to infer that if the courts resolve the matter, federal authority would

result.

(b) The CNCP-AGT Interconnection Application

All of the above may soon be nothing more than academic quibbling, if the CNCP-AGT dispute is conclusively determined by the courts.

CNCP has applied to the CRTC for permission to interconnect with AGT's local telephone facilities to avoid the necessity of installing duplicate lines into subscriber's homes for CNCP non-voice services. AGT has filed an application for prohibition to prevent the CRTC from proceeding with the application and the Federal Court is presently seized of the matter. The significance of the proceeding is that the constitutional jurisdiction to regulate provincial telephone systems, which has been untouched since the Bell[101] case, will finally be settled by the courts.

When CNCP successfully applied for interconnection[102] with the Bell Canada system in 1979, concern was expressed by provincial regulators that their monopoly on long distance voice transmission could be jeopardized by CNCP subsequently requesting permission to compete in the area of long distance telephone services.[103] Their concerns were substantiated when CNCP did apply to the CRTC in October, 1983, to allow

interconnection with Bell and B.C. Tel systems to compete in the provision of telephone services.[104]

The application respecting Bell certainly poses a threat to Bell's monopoly over telephone services, but all parties involved are federally regulated entities, therefore, the constitutional jurisdiction to regulate is not at stake. The importance of the AGT application is that the issue of which jurisdiction ultimately has authority to order interconnection must be determined. If it is decided that the CRTC has jurisdiction to proceed with the application, then provincial jurisdiction to regulate telephone systems would be nullified.

The obvious advantage of the interconnection for CNCP is that it would be able to use the telephone system already established by AGT to allow its subscribers direct access to its services, instead of setting up private lines to each subscriber's home.[105]

CNCP has argued on the merits of the application that interconnection would increase market penetration, lower costs and improve services. As well, it is in the public interest to avoid duplication of services and to increase competition. CNCP has alleged that they are losing ground to the telephone companies in

computer data services and unless interconnection is allowed, they will continue to suffer.[106]

AGT has countered these arguments essentially by suggesting that a monopoly results in economies of scale which ultimately benefits the consumer with lower costs.[107]

On the jurisdictional issue, CNCP has argued that the service provided is interprovincial, in that even though there is a local origin to the service, the total service provided extends beyond the province.[108] AGT has proposed that all the connections and services are purely local in nature and the trunk lines connecting AGT and CNCP's offices would be locally situated, consequently it is strictly a local operation.[109]

The telephone carriers' major concern about the application is the possibility of forfeiting their monopoly over long distance voice transmission. There may be good reason for apprehension considering CNCP's earlier application to interconnect with the Bell and B.C. Tel systems to compete in long distance services.[110] No decision has been rendered yet.

The threat to the telephone companies' monopoly on services has been gathering momentum for several years. One threat concerns the case of Bell Canada v.

Challenge Communications Ltd.[111] where the Federal Court of Appeal determined that a customer had the right to own the terminal equipment attached to the public switched network.[112] Not only did it allow privately owned terminal equipment attachment, but the case involved mobile radio telephones, which in themselves present a threat to the monopoly by potentially becoming a parallel mobile communications system in competition with the established telephone companies.

Factors such as Challenge and the CNCP-Bell Canada application not only have brought the current CNCP-AGT dispute to a head and forced a court determination of the jurisdictional issue, but are jeopardizing the monopoly long enjoyed by the provincial telephone systems.

Unless the matter is resolved amicably, it is suggested that the best the provinces can expect is divided jurisdiction over the telephone systems, with the federal government controlling long distance operations.[113] Because of the case law discussed earlier in the paper, the fact that AGT owns its own facilities will not be sufficient to avoid characterization as interconnecting. As long as the interconnecting aspect is more than merely incidental, federal jurisdiction will

result. Active participation in Telecom Canada and provision of long distance services are more than mere incidental activities related to the provincial operation,[114] consequently the provinces appear to have much to lose from the application.

(c) Telecommunications Reform

Recently, telecommunications has become an important issue. The convergence of computers and communications not only has had an impact on the lives of Canadian citizens, but has caused carriers to re-evaluate their policies and has caused governments to realize the necessity for more control over and more coordination within the system, to efficiently service society.[115] Governments feel that regulation of telecommunications can no longer be left within the industry itself, therefore, both federal and provincial governments have become more involved and both have exhibited the desire to establish their own policy goals.[116]

Currently, the department of communications in each jurisdiction possesses the policy responsibility over carriers, while the regulators (the provincial Public Utility Boards) have fulfilled the day-to-day decision-making role. This is true except at the federal level where the CRTC has been the primary policy maker as

well.[117] For this reason the provinces have been critical of the federal government and the role of the CRTC, especially when the Commission has shown that it will not shy away from making decisions even when the implications of the decision go far beyond their jurisdiction[118] (e.g. the CNCP-Bell Canada interconnection application or the TCTS rate inquiry discussed in the next chapter). This type of activity has concerned the provinces and combined with the desire for more control over telecommunications, has supplied the impetus for reform resulting in constitutional negotiations being initiated in the early 1970s.

Negotiations came to a head at the 1980 First Ministers' Conference on the Constitution. In spite of concerted efforts, no solution to the jurisdiction over telecommunications was reached at the conference, consequently no new provisions regarding it were included in the additions to the Constitution Act, 1982.[119] Because the issue has been seized by the First Ministers for their determination, negotiations have not continued since then and will not continue until another First Ministers' Conference is arranged.[120]

As a result of the uncertainty surrounding future negotiations in the area and because few concrete

results have evolved from the 1980 negotiations, the federal and provincial proposals tabled at the Constitutional Conference will only be presented and evaluated in a cursory manner, primarily for the purpose of disclosing how the proposals compare to the analysis of the constitutional strengths of both parties.

The federal government proposed to transfer the intraprovincial aspects of telecommunications carriers in Newfoundland, Ontario, Quebec and B.C. to the provinces, but suggested that federal authority continue over interprovincial and international aspects of telecommunications; technical standards; the interconnection of systems; over CNCP, Telesat and Teleglobe.[121]

A later compromise proposed that instead of federal control over interprovincial rates and services provided by provincial carriers, a regulatory authority made up of federal and provincial representatives be established to jointly decide the issues.[122]

The provinces proposed that provincial jurisdiction should encompass all telecommunications works and undertakings located solely within provincial boundaries and concurrent but paramount provincial jurisdiction over all works and undertakings extending

beyond provincial boundaries. Therefore, regulation of interprovincial and international services and rates would be determined by the provinces on a concurrent but paramount basis.[123]

Federal authority would include technical management of the radio frequency spectrum; the space segment of communication satellites; the national broadcasting networks; and the interprovincial telecommunication works and undertakings for aeronautics, radio-navigation, defence and for cases of national emergencies.[124]

Even a cursory review of the proposals points to several glaring problems with the provincial proposal. They limit federal authority to technical matters and fail to adequately reflect the national dimension of telecommunications. By allowing paramount jurisdiction for provincial governments over interprovincial carriers, no effective regulatory oversight over the entire system exists. Consequently, unless a joint agreement between provinces respecting rates is made, conceivably different rates for interprovincial services could exist. As well, a national carrier (e.g. CNCP) potentially could face different rules and restrictions in each province.[125]

Both proposals have shortcomings, but the

federal proposal comes much closer to a satisfactory compromise than the provincial offering. Considering that if the courts decide the issue, control likely would be placed in the federal government, or at best in a two-tiered system, the federal proposal is more accommodating than the courts would force it to be.[126]

(d) CONCLUSION

Even if cogent arguments can be presented for the separation of local and long distance services for regulatory purposes, it is very feasible that technological change may obscure any clear boundary between services.[127] Technological developments are rapidly making radio, TV, cable TV, telephone and computers so interrelated that it is difficult to consider them as separate entities.[128] In fact, in all probability the transmission of signals will escalate to the point where a single wire will handle all of society's telecommunications needs.[129] As a result, it may be that the provincial arguments for jurisdiction have simply been overtaken by technology.

The main obstacle to complete federal jurisdiction has been that the telephone industry has developed as separate natural monopolies within each province (Bell Canada excluded) and even though there are

long distance services provided through Telecom Canada's coordinated efforts, the primary focus of all the telephone companies has been the local, intraprovincial service.[130] However, it is suggested that the technological integration of all the modes of communications, combined with judicial decisions expressing that it is not possible to separate local and long distance services, make it increasingly more favourable for the federal government to be the appropriate regulating authority for the coordination of the communications network in Canada.[131]

5. THE REGULATORY AUTHORITY OF THE CRTC OVER BROADCASTING AND TELECOMMUNICATIONS

(a) Broadcasting

The CRTC originally came into existence on April 1, 1968, as the Canadian Radio-Television Commission and given the authority to regulate all aspects of broadcasting, which presently is defined within s.2 of the Broadcasting Act[132] as "any radiocommunication in which the transmissions are intended for direct reception by the general public."[133]

The CRTC is the sixth authority to have regulated broadcasting in Canada.[134] With its current structure, the CRTC has full regulatory power over public

(the Canadian Broadcasting Corporation) and private broadcasters; it operates separately from both public and private broadcasters; and it is independent of the government in its licensing and regulation making functions.[135]

The Canadian Radio-television and Telecommunications Act,[136] s.3(1), provides that the Commission be comprised of not more than nine full-time members (referred to as the Executive Committee) and ten part-time members. Part-time members do not have full decision-making powers, they may only participate in broadcasting matters and only make decisions respecting the enactment of regulations and revoking of licences. They must be consulted on licensing applications, but the final decision is made by the Executive Committee.[137]

The objects and powers of the CRTC are enumerated in Part II of the Broadcasting Act. The CRTC is to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in s.3.[138] Included in the objectives within s.3 are such matters as: the broadcasting system should be owned and controlled by Canadians; programming should be varied, comprehensive and of high standard, using predominantly Canadian

resources; a national broadcasting service should serve all geographic regions in English and French and contribute to the exchange of cultural information; and the system should be adaptable to scientific and technical advances.

To assist it in furthering its objects, the CRTC has the power to make regulations affecting licensees' ability to function.[139] Regulations may be made respecting several matters, including the quality and character of advertising, the standards of programming and any other matter the CRTC deems necessary to further the objectives in s.3. Regulations enacted so far control AM and FM radio broadcasting, television broadcasting (includes the Canadian Content Regulations), and cable television.[140] All of the regulations have the force of law and violators are subject to prosecution in the courts.[141]

Furthermore, the CRTC has the power to issue, amend, renew or suspend broadcasting licences, a function which is central to the regulation of broadcasting. It is an important function for it grants licensees the right to exclusively use a valuable public asset (the airwaves) for their economic gain; consequently, the CRTC must perform this function in accordance with the

objectives of the Act.[142]

One general restriction on the CRTC's power to issue a licence is that no licence may be issued until the Department of Communications has been satisfied that the technical requirements for a broadcasting undertaking have been met.[143]

The term of licence may not exceed five years and may be subject to any conditions deemed appropriate to fulfil the broadcasting policy in s.3.[144] An advantage of issuing conditions of licence, as opposed to enacting regulations under s.16, is that then there is no necessity to submit regulations for review and approval by the Department of Justice. Since licensees are aware that securing a licence may be dependent on them accepting the conditions imposed, the CRTC uses conditions to impose its policies onto licensees. As a result, often conditions are employed instead of regulations.[145] Also, it entitles the CRTC to tailor the licences to the capabilities of the licensees and permits them to extend their powers beyond those expressly given by Parliament, without any real threat of appeal.[146]

One last power of the CRTC is its ability to almost completely control its rules of procedure. The only qualifications to the s.21 power are a few instances

where it is required to hold a public hearing (s.19) or publish notices of specific matters in the Canada Gazette or local newspapers (s.20).

(b) Telecommunications

The regulation of telegraph and telephone companies under federal jurisdiction has primarily focussed on the regulation of rates and has not been complicated by dealing with policy considerations.[147] This factor may allow the CRTC to make decisions strictly on the facts before them, but when the CRTC has been faced with important decisions embracing complex issues affecting the structure of all telecommunications in Canada, the legislation has provided them with little guidance to meet the needs of Canada as a whole.[148] As such the CRTC's power over telecommunications is a much more narrow power than for broadcasting, which has been guided by an exigency to implement the broadcasting policy in s.3.[149]

The first federal agency with responsibility to regulate telephones and telegraphs was the Board of Railway Commissioners in 1906. The name of the Commission changed in 1938 to the Board of Transport Commissioners for Canada, which ultimately became the Canadian Transport Commission (CTC) in 1967. In 1976,

s.14 of the Canadian Radio-television and Telecommunications Act, endorsed the CRTC with the power over federally regulated telecommunications carriers which previously had been wielded by the CTC.[150]

The main powers of the CRTC for telecommunications are located within sections 320 and 321 of the Railway Act,[151] and include the subject matters set out below.

Charges to Public

All tolls for telegraph and telephone charged to the public are subject to the approval of the CRTC.[152]

Approval of Connecting Agreements

All agreements covering the connection of a federally regulated telephone system to any other system, must be approved by the CRTC.[153]

CRTC May Order Connection

If any company wants to connect with a federally regulated telephone system and agreement cannot be reached, then they may apply to the CRTC for an order connecting the systems.[154]

Rates

All tolls must be just and reasonable.[155]

Discrimination

The toll charged may not unjustly discriminate against

any person or company[156] and may not give any unreasonable preference or advantage to a person or company.[157]

ENDNOTES

1 Formerly The British North America Act, 1867, 30 & 31 Victoria, c.3.

2 Re Regulation and Control of Radio Communications, [1932] A.C. 304 (P.C.), at p. 315.

3 R. A. Brait, "The Constitutional Jurisdiction to Regulate the Provision of Telephone Services in Canada", (1981), 13 Ottawa L.R. 53, at p. 65.

4 Ibid., p. 66.

5 C.H. McNairn, "Transportation, Communication and the Constitution - The Scope of Federal Jurisdiction", (1969), 47 Can. Bar Rev. 355, at pp. 385 - 386.

6 D.L. Cannon & G. Luecke, Understanding Communications Systems (Dallas: Texas Instruments, 1980), p. 5 - 10.

7 Ibid., p. 10-2.

8 Ibid., p. 5-15.

9 [1954] 4 D.L.R. 657; [1954] A.C. 541 (P.C.), at p. 581. See also Brait, "Telephone Services", p. 68.

10 [1932] A.C. 304 (P.C.), at 312.

11 Ibid., p. 314.

12 (1965), 51 D.L.R. (2d) 716 (B.C.C.A.), at p. 718.

13 Ibid., p. 719.

14 [1973] 3 O.R. 819; 38 D.L.R. (3d) 335 (C.A.).

15 38 D.L.R. (3d) 335, at p. 340.

16 Ibid., p. 339.

17 [1978] 2 S.C.R. 141, at p. 161.

18 Ibid., p. 162.

19 Ibid.

20 Ibid., p. 163.

21 [1978] 2 S.C.R. 191.

22 Ibid., p. 197.

23 Ibid., p. 198.

24 Ibid. This statement confirmed the earlier decision of Re Tank Truck Transport Ltd., [1960] O.R. 497; aff'd [1963] 1 O.R. 272 (C.A.).

25 [1978] 2 S.C.R. 191, at p. 197.

26 Brait, "Telephone Services", p. 65.

27 Ibid., p. 66.

28 Ibid.

29 D. Mullan & R. Beaman, "The Constitutional Implications of the Regulation of Telecommunications", (1973), 2 Queen's L.J. 67, at p. 90.

30 "A Commentary on the Constitutional Issues", Legal Powers & Structures, and Constitutional Issues in Canadian Broadcasting Communications, Volume 3, p. 60 (Windsor: The Centre for Canadian Communication Studies, University of Windsor, 1979), p. 60.

31 R. P. Doherty, "The Case for Provincial Regulation of Community Antenna Television Systems in the Wake of Capital Cities and Dionne", (1979), 5 Dalhousie L.J. 760, at 766.

The comment has also been made that one opening left for possible provincial jurisdiction is the distribution of non-broadcasting signals on a cable system. The system would be closed-circuit and would distribute only locally originated programming. Saskatchewan has already acted on this distinction as the basis for proposed legislation last year; the Cable Services Act was introduced in bill form to allow for the regulation by a cable services commission of non-programming services on the cable TV system within the province.

See T. G. Kane, "Communication in the 80's: Major Issues", paper presented at a National Communications Conference, sponsored by the University of Calgary Graduate Program in Communications Studies and the Province of Alberta

Department of Utilities and Telecommunications, at Calgary, Alberta, on April 30, 1984, at p. 12.

32 M. K. Miazga, "Cable Television: A Case for Co-operative Federalism", (1978), 43 Sask. L.R. 1, at p. 8.

33 Supra, footnote 30, at p. 64.

34 R.J. Buchan and C.C. Johnston, "Telecommunications Regulation and the Constitution: A Lawyer's Perspective", Telecommunications Regulation and the Constitution, p. 115 (Montreal: The Institute for Research on Public Policy, 1982), at p. 130.

35 [1946] A.C. 193 (P.C.), at p. 205.

36 J.S. Wilkie, "The Radio Reference and Onward: Exclusive Federal Jurisdiction Over General Content in Broadcasting?", (1980), 18 Osgoode Hall L.J. 49, at p. 57.

37 [1952] 1 S.C.R. 292.

38 [1976] 2 S.C.R. 373.
The Anti-Inflation Act restrained profit margins, prices, etc., as a means to reduce inflation for the benefit of all Canadians because inflation was recognized by the government as a matter of serious national concern. The Act was held to be valid legislation for the peace, order and good government of Canada. The court found that the validity of the Act did not depend on the "national dimensions" test. The power to legislate was not within one of the s.91 enumerated heads, therefore, it was within POGG. POGG could only invade provincial concerns when legislation was directed to cope with a genuine national emergency. (at p. 427).

39 Supra, footnote 30, at p. 62.

40 Canada, Department of Communications, Towards a New National Broadcasting Policy (Ottawa: Minister of Supply and Services, 1983), p. 1.

41 Ibid., p. 2.

42 Ibid., p. 4.

43 Wilkie, "Radio Reference and Onward", p. 55.

44 Ibid., p. 56.

45 Ibid., p. 63.

46 Ibid., p. 65.

47 [1978] 2 S.C.R. 211.

48 Ibid., p. 225.

49 Wilkie, "Radio Reference and Onward", p. 67.

50 Mullan & Beaman, "Constitutional Implications", p. 73.

51 Direction to the CRTC (Reservation of Cable Channels), C.R.C., c.378.

52 Direction to the CRTC (Ineligibility to Hold Broadcasting Licences), C.R.C., c.377.

53 C.C. Johnston, The Canadian Radio-Television and Telecommunications Commission, prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1980), p. 13.

54 Ibid., p. 14.

55 Supra, footnote 30, at p. 72.

56 Miazga, "Cable Television", p. 9.

57 [1905] A.C. 52 (P.C.)

58 Doherty, "Case for Provincial Regulation", p. 768.

59 Ibid., pp. 769-770. Note: The list originally was drawn up by Peter Grant but has been excerpted from Doherty's article.

60 T.G. Kane, "Communication in the 80's: Major Issues", paper presented at a National Communications Conference Sponsored by University of Calgary Graduate Program in Communications Studies and the Province of Alberta Department of Utilities and Telecommunications, at Calgary, Alberta, April 30, 1984, p. 6.

61 Brait, "Telephone Services", p. 54.

The members of Telecom Canada are: Alberta Government Telephones (AGT); Bell Canada; British Columbia Telephone Company (B.C. Tel); Manitoba Telephone System (MTS); Maritime Telegraph and Telephone Company (MT & T); Newfoundland Telephone (Nfld. Tel.); Saskatchewan Telecommunications (Sask. Tel.); The Island Telephone Company (Island Tel.); The New Brunswick Telephone Company (N.B. Tel.); and Telesat Canada. Telesat Canada joined Telecom Canada to provide more effective relay services for the consortium members.

62 Ibid., p. 55.

63 Buchan & Johnston, "Telecommunications Regulation", p. 122.

64 Kane, "Communication in the 80's", p. 14.

65 Brait, "Telephone Services", p. 55.

66 Ibid. Provides a description of the procedure for revenue sharing.

67 Ibid., p. 56.

68 Kane, "Communication in the 80's", p. 11.

69 Ibid., p. 4.

70 Brait, "Telephone Services", p. 56.

71 Kane, "Communication in the 80's", p. 24.

72 Brait, "Telephone Services", p. 57.

73 Ibid.

74 Ibid.

75 Kane, "Communication in the 80's", p. 6.

76 Brait, "Telephone Services", p. 57.

77 Buchan & Johnston, "Telecommunications Regulation", p. 124.

78 Kane, "Communication in the 80's", p. 15.

79 Ibid., pp. 15-17.

80 Buchan & Johnston, "Telecommunications Regulation", p. 125.

81 Section 92(10)(c) allows federal jurisdiction over: "Such works as, although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of Two or more of the Provinces."

82 [1905] A.C. 52 (P.C.), at p. 59.

The Bell case is important for cable TV operations because they need to lay cable throughout cities, therefore, the municipality is not able to prohibit the cable company's activity. See Miazga, "Cable Television", p. 3. Also see Re Oshawa Cable TV and Town of Whitby, [1969] 2 O.R. 18 (H.C.J.).

83 Buchan & Johnston, "Telecommunications Regulation", p. 120.

84 Brait, "Telephone Services", p. 59.

85 Ibid., pp. 60-63.

86 Buchan and Johnston "Telecommunications Regulation", p. 132.

87 [1927] 4 D.L.R. 85; [1927] A.C. 925 (P.C.), at p. 932.

See also Buchan & Johnston, at p. 132, and Ottawa Valley Power Co. v. Hydro-Electric Power Commission, [1937] O.R. 265; [1936] 4 D.L.R. 594 (C.A.).

88 Brait, "Telephone Services", p. 68.

89 (1983), 44 O.R. (2d) 560 (C.A.), at 567.

90 Ibid., p. 568.

91 Brait, "Telephone Services", p. 68.

92 [1912] A.C. 333 (P.C.), at p. 346.

93 Buchan & Johnston, "Telecommunications Regulation", p. 132.

94 Brait, "Telephone Services", p. 72.

95 Buchan & Johnston, "Telecommunications Regulation", p. 133.

96 Brait, "Telephone Services", p. 70. Concurrent regulation is feasible assuming that there is a vacuum in federal regulation, thereby permitting concurrent provincial regulation.

97 Ibid., p. 81.

98 Ibid., p. 74.

99 Buchan & Johnston, "Telecommunications Regulation", p. 133.

100 Kane, "Communication in the 80's", p. 29. The comment that a separate local service is not economically viable is based on the current billing practice where the flat fate service is subsidized by the long distance service. If the billing practice changes to accommodate a higher flat rate or a charge based on actual use, then the local service might be economically viable on its own.

101 D. Jackson, "The CNCP-AGT Interconnection", paper prepared for Communications Law class at Faculty of Law, University of Alberta, April, 1984, p. 2.

102 Canada, CRTC, Telecommunications Decision CRTC 79-11

103 Jackson, "CNCP-AGT", p. 6.

104 Canada, CRTC, Public Notice, CRTC Telecommunications Notice 1984-6.

105 Jackson, "CNCP-AGT", p. 5.

106 Ibid., p. 28.

107 Ibid.

108 Ibid., p. 15.

109 Ibid., p. 14.

110 Ibid., p. 6.

111 (1978), 22 N.R. 1; 86 D.L.R. (3d) 351 (F.C.C.A.).

112 G. E. Kaiser, "Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carriers", (1981), 13 Ottawa L.R. 95, at p. 102. Generally, see discussion at pp. 99-103.

113 See Brait, p. 94, where he suggests that a two-tiered regime is the desirable result, but it is likely that federal jurisdiction will be found. Buchan & Johnston, at p. 120, suggest that neither option would be as effective as the current set up.

114 Jackson, "CNCP-AGT", p. 8.

115 Kane, "Communication in the 80's", pp. 17-18.

116 Ibid., p. 19.

117 Ibid., p. 20.

118 Ibid., p. 21.

119 Constitution Act, 1982, enacted by the Canada Act 1982 (U.K.), c.11.

120 Kane, "Communication in the 80's", p. 23.

121 T. G. Kane, "Breaking an Impasse: A Joint Panel Proposal for Telecommunications Regulation", Telecommunications Regulation and the Constitution, p. 225 (Montreal: The Institute for Research on Public Policy, 1982), p. 248.

122 Ibid., p. 253.

123 Buchan & Johnston, "Telecommunications Regulation", p. 138.

124 Ibid.

125 Ibid., p. 139.

126 Ibid., p. 151.

127 Brait, "Telephone Services", p. 81.

128 Kane, "Communication in the 80's", p. 13.

129 Brait, "Telephone Services", p. 83. For example, Saskatchewan already has undertaken a province-wide fibre-optic transmission system.

130 Kane, "Communication in the 80's", p. 14.

131 Ibid., p. 13.

132 R.S.C. 1970, c. B-11, as amended.

133 Johnston, The CRTC, p. 3.

134 Ibid., p. 4. The other five are: Minister of Marine & Fisheries (1919-1932); Canadian Radio Broadcasting Commission (1932-1936); Canadian Broadcasting Corporation (1936-1958); Board of Broadcast Governors (1953-1968); Canadian Radio-Television Commission (1968-1976). For more detail see R.G. Penney, "Telecommunications Policy and Ministerial Control", (1970), 2 Can. Comm. L.R. 8.

135 Johnston, The CRTC, p. 7.

136 S.C. 1974-75-76, c. 49.

137 Johnston, The CRTC, p. 19.

138 Broadcasting Act, R.S.C. 1970, c. B-11, s.15.

139 Ibid., s. 16.

140 Also, the CRTC has set out a proposed set of regulations for Pay TV Networks. See Public Notice. CRTC 1984-3, January 5, 1984.

141 R.E. Babe, "Regulation of Private Television Broadcasting by the Canadian Radio-Television Commission: A Critique of Ends and Means", (1976), Can. Pub. Admin. 552, at 576.

142 Ibid., p. 564.

143 Johnston, The CRTC, p. 3.

144 Broadcasting Act, s.17.

145 Babe, "Regulation of Private Television", p. 576.

146 Ibid., p. 578.

147 Johnston, The CRTC, p. 7.

148 Ibid., pp. 46-47.

149 Ibid., p. 46.

150 Ibid., p. 8.

151 R.S.C. 1970, c. R-2, as amended.

152 Ibid., s.320(2).

153 Ibid., s. 320(11).

154 Ibid., s.320(7).

155 Ibid., s.321(1).

156 Ibid., s.321(2)(a).

157 Ibid., s. 321(2)(b).

CHAPTER 2

THE CRTC AS AN INDEPENDENT ADMINISTRATIVE AGENCY

1. INTRODUCTION

In surveying administrative agencies generally, six different classifications for the levels of executive control over regulatory bodies have been identified. The levels range from mere agent bodies, which possess no effective independence from the executive, to bodies which make policy and adjudicate decisions subject to review or appeal to the executive and the courts, but not to prior approval from the executive. Of all the agencies in Canada, the CRTC is one of only two agencies which falls into this latter classification.[1]

In fact, it has been stated that since the CRTC performs adjudicative, legislative, research, advisory and administrative functions, it could be thought of as a government on its own.[2] An adjudicative role for a regulatory agency is one where decisions are made on a case by case basis with little policy formulation, because the policy is supposedly contained in the empowering legislation. The performance of the legislative role results in an agency consciously creating policy in advance of deciding cases.[3]

The uniqueness of the CRTC is that it is not within a departmental heirarchy which allows it to be independent, because it is run by tenured commissioners

with a high degree of expertise who are insulated from the political process.[4] One of the keys to independence of a regulator is the tenure of commissioners who cannot be removed except for cause, similar to the judiciary.[5]

Even though there is ministerial accountability to Parliament over the actions of the agency, an agency such as the CRTC is given independence to function for several reasons. For one, the agency keeps the regulation of the industry away from partisan political matters; it preserves the arm's length relationship with government which is necessary to allow for objective adjudication. As well, it is desirable for ministers to have someone else deciding sensitive matters to relieve them from accounting for them and to shield them from making unpopular decisions at inappropriate times.[6]

Furthermore, regulatory agencies are necessary because neither politicians nor public servants are capable of providing the specialized and impartial regulation that is needed[7] to ensure that the public intervention in the private sector maintains impartiality and freedom from political interference.[8] Full-time, detached professionalism is required and it can only be obtained by allowing the agency a degree of independence.[9]

But, inevitably, political questions become part of the decision-making, therefore, regulating does

not just involve a technical expertise or judicial objectivity separate from politics.[10] Policy begins to play a very large role in decision-making, consequently when discussing the role of an independent administrative agency, the concept of policy must be addressed.

A policy could be described as "an attitude towards a state of facts, coupled with the power to do something about it."[11] Or, one could define it as a general guide to making decisions which may be discretionary or compulsory.

In a heirarchical situation, as with the CRTC and the government, there are several levels of policy making,[12] which leads one to ponder the issue of who actually makes the policy and who carries it out in the regulatory process. Even though policy may not determine the adjudication of a specific matter, it is important because it certainly plays a pivotal role in the resolution of any issue.[13]

If the policy comes from outside the agency, then there are problems with its practical application for the agency. For example, how much emphasis should an independent agency give to government policy; should it be merely persuasive or binding? Also, and perhaps more importantly, what is policy? Does policy include a Minister's speeches, formal statements from Parliament,

government reports, position papers[14] or possibly even letters from Ministers? After an agency has determined how it will treat outside influences they must deal with its internal policy-making capabilities.

With the CRTC, its role transcends mere implementation of policies enunciated by Parliament or Cabinet: the CRTC itself formulates policies not only from its decisions, but from the legislative power granted to it.[15]

CRTC policy is created through three different mechanisms: through the promulgation of formal regulations; through policy statements; and through case by case decisions.[16]

Regulations

The regulations applied by the CRTC, both procedural and substantive, are made by it independently and are not subject to executive approval.[17] However, they must be forwarded to the clerk of the Privy Council and the Deputy Minister of Justice under the Statutory Instruments Act[18] for review[19] to ensure that the agency is acting within its powers.

Whether or not the CRTC should exercise the power to translate statutory policy into regulations has been questioned by some, for it is felt that only the executive should possess the ability; however, it is

suggested that where the policy is broadly stated (as in the Broadcasting Act) then a regulator is in a position to more appropriately interpret the public interest considerations. As well, by leaving the responsibility with the CRTC, Cabinet is freed from the time consuming task of approving regulations.[20]

Policy Statements

The CRTC is the one federal agency which employs an overt policy making procedure by issuing policy statements on matters for applicants to consider prior to appearing before the Commission.[21] They have made extensive use of the policy statements and guidelines arrived at after public hearings and considerable public input.[22] The hearings have been employed as a means of ascertaining problems within the industry and receiving public response regarding the appropriate policy to resolve the matter in advance, rather than waiting to deal with it on a case by case basis. By announcing policy considerations in advance, not only do applicants benefit from the greater predictability of knowing what to expect, but the agency benefits from more consistency leading to fairness to all.[23] All of this allows for more openness in the regulatory process and permits the CRTC to concentrate on

implementing policy after acquiring public approval, rather than focusing on attempting to change inadequate policies.[24]

The Supreme Court of Canada in Capital Cities has endorsed the use of policy guidelines by the CRTC as a desirable regulatory technique. They confirmed that the open procedures (public hearings and submissions) employed to develop policy result in it being easily adaptable to actual problems faced by applicants and are not merely directions from government officials who may be out of touch with the practical realities of a situation. As such, the CRTC should be encouraged to continue articulation of its policy.

As Chief Justice Laskin stated,

> "In my opinion, having regard to the embracive objects committed to the Commission under s.15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance."[25]

The commercial deletion policy in Capital Cities was CRTC policy, it was not a regulation or government guideline, nevertheless the court found that the matter was within the scope of the CRTC's mandate,[26] which exemplifies the CRTC's vast scope of power to implement policy it deems necessary. It also exhibits the independent nature of the agency not only to formulate policy, but to choose to avoid the formal procedures entailed in promulgating regulations.

Even though policy may only be in the form of statements by the CRTC, as far as licensees are concerned they are still a body of regulations effectively controlling their actions. In this manner, the CRTC has taken power unto itself and used it to shape broadcasting without the need to enact formal regulations.[27]

Case by Case

Aside from policy statements and formal regulations, the CRTC still makes policy on a case by case basis. It is desirable to formulate policy through the resolution of practical problems for it maintains a degree of flexibility in a process where, at times, it is difficult to detail all aspects of objectives in advance.[28] Yet, in spite of policy formulation being done on a case by case basis, consistency in policy is still maintained through collegial decision-making (the

process of allowing commissioners who were not at the hearing to participate in the making of the decision).

In conclusion, since often the CRTC alone sets policy that determines the nature of the broadcasting industry, it has been referred to as having assumed the role of a broadcasting parliament;[29] it is not just a regulator of broadcasting, but is a de facto parliament.[30]

Is the CRTC's Independence Being Threatened?

The inception of the CRTC was intended to delegate regulation of broadcasting to a single, independent body, free from political influence.[31] Even though it has considerably more independence than its predecessors or other agencies in Canada, in the last few years several incidents have brought its independent status into question.[32]

In the mid to late 1970s two situations where the CRTC was under no obligation to act, but did act at the government's request, brought doubts as to their independence from government influence. The situations did not involve Orders in Council, but all the same, were attempts by the government to politically interfere with the regulatory process.

In the first, Prime Minister Trudeau requested the CRTC to inquire into allegations of pro-separatist

bias in the CBC. Serious repurcussions could have ensued but CRTC Chairman, Harry Boyle, handled the affair admirably. In spite of conducting the inquiry when there was no obligation to, he managed to satisfy the government that the matter had been looked into, therefore, an independent review from an outside body was not required, yet came away without having tarnished the integrity of the CRTC's independent status because the government did not influence the results of the inquiry.[33]

The second incident involved the timing of the introduction of Pay television in Canada. In June 1975, the CRTC suggested that it was premature to establish Pay TV in Canada. In June, 1976, Minister of Communications Sauve declared that Pay TV was inevitable and requested that the CRTC consider submissions regarding its development.[34]

Following a public hearing in June, 1977, to review the submissions from the industry, the CRTC again decided not to introduce Pay TV for they felt that it was still too early to proceed with its development.[35] As a result, the affair ended in a deadlock between the government and the agency, but there were allegations that since the CRTC was not even obliged to reconsider the issue and the Minister had no power to order

reconsideration, the fact that the CRTC had responded to the government's request ushered misgivings about its independence.[36]

These two illustrations reveal the type of pressure the CRTC was beginning to feel from the government to act in accordance with government expectations. Even though the CRTC asserted their independence by accommodating, but not yielding to government pressure, these instances of informal political interference were a prelude to burgeoning government intervention through more formal channels.

Prior to 1976, the Governor in Council did not actively interfere with CRTC decision-making by setting aside or altering decisions with the use of Orders in Council.[37]

Several petitions had been advanced by interested parties (there were nine petitions under s.23 Broadcasting Act up to 1975[38]) but they were all refused. However, since then Cabinet has intervened on numerous occasions to overturn CRTC decisions in both broadcasting and telecommunications. The Manitoba Cable situation in 1976 was the first time Cabinet responded by reversing a CRTC decision in broadcasting.[39] The first in telecommunications involved the reversal of the CRTC refusal to allow Telesat Canada to join TCTS in 1977.

Since these events, the Governor in Council has refused many petitions,[40] but as corroborated by the discussion to follow, the Governor in Council has continued the trend of intervening into the regulatory process more than ever before.

With these introductory comments in mind, the remainder of the chapter will set out and examine the specific government powers directly affecting the CRTC, namely, the direction-making ability and the review powers of the Governor in Council. The statutory provisions for each will be discussed and then both powers will be considered to see if there is accountability in the government for their actions.

A summary of the Orders in Council which have affected the CRTC's role as the regulator of broadcasting and telecommunications in Canada will follow, for the purpose of ascertaining whether the Governor in Council has been excessively influential in his relationship with the CRTC.

2. THE GOVERNOR IN COUNCIL'S POWER TO ISSUE DIRECTIONS AND TO REVIEW CRTC ACTION

It is fundamental to keep in mind that an agency takes its power from statute and has no power other than that given to it by Parliament.[41] In the case of the CRTC, the Broadcasting Act gives it broad

authority to regulate and supervise all aspects of the Canadian broadcasting system with the view to implementing the policy in the Broadcasting Act and imposes few restraints. Its independence is only affected by the executive ability to issue directions (restricted to subject matters listed in s.18 and s.22) and to appeals to Cabinet.[42] Both the direction-making ability and the Cabinet appeal are statutory provisions inherent in the system.

(a) THE GOVERNOR IN COUNCIL'S DIRECTION POWER

(i) Statutory Provisions

The ability of the Governor in Council to issue directions to the CRTC is given by s.27(1) of the Broadcasting Act, which specifies that the Governor in Council may issue directions as provided for by subsections 18(2) and 22(1)(a). Any direction made is to be published forthwith in the Canada Gazette and must be laid before Parliament within fifteen days after its inception, or if Parliament is not sitting, within fifteen days of its next sitting.[43]

Under s.18(2), the Governor in Council may require licensees to broadcast any programme that the Governor in Council deems to be of urgent importance to Canadians generally, or to persons resident in specific areas. This particular directive power has never been

used by Cabinet,[44] but it is available if the need arises.

The direction power which has been used on four separate occasions is derived under s.22(1)(a), which allows Cabinet to issue directions to the CRTC respecting:

i) the maximum number of channels or frequencies that may be allotted within designated geographic areas;

ii) the reservation of channels for use by the CBC or for any special purpose; or

iii) to restrict the classes of applicants to whom broadcasting licences may be issued.

The four directions issued under s.22(1) are listed below. It should be stressed that all of the direction powers listed only deal with the broadcasting segment of the industry; under the present legislation there is no corresponding power to give directions concerning telecommunications matters.[45]

(ii) Directions under s.22(1)(a)

The Direction to the CRTC (Eligible Canadian Corporations)[46] indicates that broadcasting licences may not be issued or renewed to applicants who are not Canadian citizens or eligible Canadian Corporations as defined within the Direction.[47]

The Direction to the CRTC (Ineligibility to Hold Broadcasting Licences)[48] directs the CRTC not to

issue broadcasting licences to provincial agencies, including municipal or public bodies, which are empowered to perform duties on behalf of the provincial government. It provides that licences may be granted to independent corporations to provide learning opportunities aimed at improving the knowledge of the public or broadcasting special educational events.

The Direction to the CRTC (Reservation of Cable Channels)[49] specifies that all cable licensees must reserve at least one channel of their facility for the provincial authority for educational broadcasting.

These last two directives, in part, are an acknowledgement by the federal government that the provinces have some interest over educational broadcasting and they are intended to provide the provinces with a mechanism to develop the broadcasting of educational programming. They already have been discussed in connection with the constitutional jurisdiction over educational broadcasting.

The most recent direction, The Direction to the CRTC on Issue and Renewal of Broadcasting Licences to Daily Newspaper Proprietors,[50] was initiated so that daily newspapers would be prohibited from owning or controlling broadcasting undertakings operating in the same market area, in an attempt to ensure independent

competitive and diverse sources of news and viewpoints.

This last direction was issued by the Governor in Council on July 29, 1982 to take steps to restrict cross-ownership between broadcasters and owners of daily newspapers. The government noted that the direction was not conceived because media were serving audiences in an irresponsible manner, but because there had been concerns expressed by both the CRTC and the recent Royal Commission on Newspapers[52] that there was a potential for abuse resulting from cross-ownership, therefore, the direction was issued as a precautionary measure.[53]

The direction states that broadcasting licences or renewals would not be granted to a proprietor of a daily newspaper (only applies to dailies, not to weekly papers) if the proprietor owns or controls, or is in a position to effectively own or control, directly or indirectly, a broadcasting operation. However, exceptions can be made if there are overriding public interest considerations.[54]

Public hearings in early 1983 examined five applicants deemed to be subject to the direction. In three of those cases, the CRTC determined that the direction did not apply to the broadcaster.[55] For example in the case of CFCN in Calgary, the licensee is owned one hundred percent by Maclean-Hunter Ltd. (MHL). MHL also

owns 49.7% of three daily newspapers in Canada, one of which is the Calgary Sun.[56] The CRTC had to determine whether 49.7% interest meant that MHL was in a position to control the newspaper directly or indirectly.[57] It appeared as if the degree of ownership was sufficient to bring the situation within the grasp of the directive, but after carefully reviewing all agreements, the voting structures and financial arrangments, the CRTC concluded that MHL was not in a position to effectively control the newspaper, therefore, the licence was renewed.[58]

In the fourth case, the CRTC found that the direction did apply to CFPL-TV in London, but not granting the licence renewal would have been contrary to the public interest because the London area already was experiencing diversity and a level of competition in the media and CFPL provided an outstanding broadcasting service, therefore the licence was renewed.[59]

In the fifth case, concerning CHSJ-TV in St. John, the direction was applicable and renewal would have been refused except that the licensee was the only CBC English-language TV service in New Brunswick. Consequently it was in the public interest to renew the licence for a term of twenty-seven months to allow the licensee to rearrange the financial affairs to meet the requirements of the direction. Therefore, the directive

forced a divesting of ownership to avoid any potential abuse resulting from cross-ownership.[60]

(iii) Commentary

As is evident from the nature of the four directions listed, they encompass general policy goals for the broadcasting system to strive for. They are not intended to be directed at specific broadcasting disputes or to provide an open mandate to direct all policy-making of the CRTC: they merely allow for the government to set out global policy guidelines within the confines of the subjects listed in s.22 of the Broadcasting Act.

Since the direction-making power of the Governor in Council is not all encompassing and is limited to specific subject matters, procedures for more formalized and complete powers have been proposed several times in the past. In April, 1975, the Minister of Communications announced proposals to allow Cabinet to give formal directions to ensure that policy development remained under the control of the elected public representatives and not with an independent agency.[61]

Proposals for reform in 1977 and 1978 stressed the necessity of granting Cabinet authority to issue directions to the CRTC to achieve the policy objectives in the proposed Telecommunications Act.[62] The proposed Act is intended to consolidate the regulation of all

aspects of broadcasting and telecommunications into one piece of legislation and more precisely set out the future policy objectives for broadcasting and telecommunications in Canada. Several drafts of the legislation have been introduced since 1977, and a draft currently stands before Parliament, but it has not received approval.

Again, in the new broadcasting policy announced for Canada by Minister Francis Fox on March 1, 1983, reference was made to the government intention to introduce legislation empowering Cabinet to issue legally binding policy objectives to the CRTC.[63] The directives would be limited to broad policy matters only and could not influence: the issuing, amending or renewing of broadcast licences; programming content; the imposition of any restriction on the freedom of expression; or any charges levied on broadcasters.[64] Ostensibly the adjudicative function of the CRTC would remain intact, only the more general policy-making function of the CRTC would be affected.

As is evident, the government has been proposing to introduce a trend toward politicizing the regulatory process and stripping the CRTC of some of its independence. The CRTC's potential to openly make policy would be restricted by the Minister's ability to issue

guidelines in advance to dictate decision-making.[65]

The proposals to allow the issuing of directions to the CRTC as a means of implementing policy objectives have been criticized for bestowing too much power on Cabinet. One author has suggested that considering how rarely directives have been used in the past, there may be no reason to fear the additional powers. They are intended to be employed concerning broad policy matters and their use should not interfere with the day-to-day operations of the CRTC.[66] However, considering that the government has exhibited a determination to empower itself to issue binding directives and has found itself involved in controversial and unpopular Cabinet appeals when attempting to harness the independence of the CRTC, the past use of the directive power may not be indicative of the government's future desire to implement policy. The concern is that the power could be used gradually to transform the CRTC into more of an advisory body, satisfied with operating within the confines of the political arena.

Another concern with the Cabinet's ability to issue directions is that unless measures are taken to provide for it, the practice of conducting public hearings to discuss policy proposals would be seriously curtailed. This could result in policy being shaped

without adequately reflecting the information and opinions of the various interests directly involved in the day-to-day operations,[67] which could lead to policy being unsuitable for the daily functioning of the industry. But, this is not to suggest that the four directions issued so far have been inappropriate, they have dealt with ownership, citizenship and educational issues which needed to be addressed and have not created unnecessary havoc in the sytem. The cross-ownership direction resulted in some shuffling within the ownership structures of some licensees, but the ultimate goal is to prevent any adverse effects to the public concerning the quality of news received and as such is a legitimate intervention.

One last concern is that Cabinet directions are not an optimum method of dealing with policy because policy requires dealing with problems before they arise and finding suitable solutions, which it is suggested, is not compatible with politics where a Minister wants to keep options open.[68]

There is one control on the Governor in Council's unlimited use of the proposed power. Cabinet is compelled to conform closely with the policy objectives contained in the empowering legislation, they would not be free to simply dictate policy affecting

individual cases or strategies not in conformity with the legislation.[69] This protection is evident in both the current legislation (the topics listed in s.22(1)(a) for which directives may be issued are specific) and in the policy statement of March 1, 1983, concerning proposed legislation, which again restricts the Cabinet's power to prevent them from directly attacking individual licensees.

In any event, in spite of concerns over how much discretion the executive would hold, the principle of legally binding policy directives generally has been endorsed by commentators. As previously indicated, the directions issued so far have not been unreasonable, nor have they created cause for alarm. They have allowed for issues to be aired in advance and have not resulted in selected decisions of the CRTC being changed. The main reservation remains over the coinciding existence of the political appeal power.[70]

(b) CABINET APPEALS - THE GOVERNOR IN COUNCIL'S POWER TO REVIEW OR SET ASIDE

(i) Procedure

Before discussing the Governor in Council's power to review CRTC decisions, a summary of the appeal procedure should be presented to assist in comprehending the nature of the process.

The first thing to pronounce is that there are no formal procedures for petitions to Cabinet; they can be in the form of a letter or a brief to the Clerk of the Privy Council or the Minister of Communications. Since there is no formality, the cost of appealing and the length of submissions are completely within the discretion of the parties themselves.[71] As a result, it is easy for an interest group or a licensee, who has been treated unfavourably by the CRTC, to petition Cabinet.[72] Usually the parties to a petition are the principal parties from the original hearing, but the public, parliamentarians or provincial governments can get involved as a matter receives publicity.[73]

The appeal is not a public hearing, the proceeding is secretive. There is no legal obligation to notify any party of the petition including those from the original hearing. Cabinet treats the petition as a private matter between Cabinet and the petitioner. If interested parties are notified, it is done out of courtesy. Moreover, there is no exchange of pleadings unless the parties themselves wish to do so.[74]

The CRTC does not usually become a party to the proceeding, but can be involved and consulted if Cabinet requires it.[75] The practice has been to forward a copy of the petition to the CRTC and ask for its comments.[76]

There is no requirement that Cabinet abide by the rules of natural justice, therefore, there is no necessity to allow any party the right to respond either orally or in writing.[77]

Parties have pushed to have more formalized procedures instituted but Cabinet prefers the present system because it is expedient for them to deal with petitions.[78]

The petitioning process begins when the petition, received by the Department of Communications (DOC) or the Privy Council, is referred to DOC officials to prepare a memorandum for Cabinet. The Minister's recommendation for treatment of the matter and any necessary documentation are then forwarded to a Committee of Cabinet for consideration.[79]

If submissions have been filed by interested parties, DOC may or may not consider them. In any event, DOC arrives at its recommendation independently.[80] A discussion may be prepared to accompany the Minister's recommendation. If documentation is prepared and it contains inaccuracies, there is little opportunity to challenge them because the documents are confidential and the information may never surface.[81]

A decision can be based on any material the Minister considers relevant, therefore, often information

which was not even raised by the parties at the hearing before the agency is considered. This is distinguishable from a judicial appeal where only the evidence from the lower court may be placed before the appeal court. This creates a problem for parties wanting to make submissions to Cabinet because they would have no idea of the case they have to meet.[82]

The Committee then makes recommendations to Cabinet based on the Minister's recommendation. Prior to forwarding their recommendation to Cabinet, they may ask for clarification from concerned parties.[83]

At Cabinet, two lists are prepared for their consideration, a controversial and a non-controversial list. The latter is read off and unless there are any objections it is ratified. Cabinet decisions are made on a consensus basis.[84]

A final decision on the petition is published as an Order in Council with no reasons given either orally or in writing. If it is a controversial topic, a Ministerial press release may accompany the decision,[85] but usually political considerations prevent publications of full reasons.[86]

It is suggested that because of the nature of the proceeding, the informality of the procedure and the reliance on the Minister's recommendation, unless the

matter has been highly publicized, most Cabinet members would know little about the matter apart from the recommendation before them. Also, Cabinet as a group does not have the time to carefully consider appeals.[87] Considering that in 1983 there were approximately 4,200 Orders in Council passed[88] (only a few of which were Cabinet appeals), it is patent that little time can be allotted for consideration of any one item.

Not just any matter should be appealed to Cabinet; a proper matter for a petition is on a point of policy of a non-technical nature. If a party wishes to challenge a tribunal's procedure, then proceeding by normal channels for judicial review would be the appropriate avenue.[89] Consequently, the Cabinet appeal is an important consideration when discussing the concept of policy, for the appeals are not intended to review legal matters, they are restricted to reviewing broad policy considerations.[90]

(ii) Statutory Provisions for Cabinet Appeals

The Cabinet's power to review broadcasting matters comes from s.23(1) of the Broadcasting Act, while s.64(1) of the National Transportation Act[91] allows review respecting telecommunications matters.

Section 23(1) permits the Governor in Council to set aside or refer back to the CRTC for

reconsideration and hearing any decision concerning the issue, amendment or renewal of a broadcasting licence, provided action is taken within 60 days after the CRTC decision. The section does not specify who is able to initiate petitions to Cabinet, it only makes reference to the Governor in Council, however, since Cabinet has acted on petitions from interested parties presumably anyone, including Cabinet, is entitled to initiate the proceeding.[92]

It should be noted that s.23 only applies to the issue, amendment or renewal of licences: if a licence has been refused there is no right of appeal to Cabinet. In this respect, the power in s.23 is not a complete avenue of appeal. In addition, the Governor in Council can only set aside or refer back to the CRTC, he is not permitted to vary the decision.[93]

If Cabinet refers the matter back to the CRTC for reconsideration and hearing, it should set out any details which it felt the CRTC failed to consider or did not adequately consider.[94]

Where the CRTC has reconsidered the issue, amendment or renewal of a licence, it may rescind the licence, rescind it and issue it to any other person, rescind the amendment or renewal; or confirm its previous decision with or without variation.[95] If the CRTC has

confirmed its original decision, with or without variation, the Governor in Council may still act to set aside the decision by order within 60 days after the confirmation.[96]

Section 64(1) of the National Transportation Act sets out that the Governor in Council can act at any time, upon petition by anyone, including on his own motion, and without any petition or application, to vary or rescind any order, decision, rule or regulation of the CRTC. The CRTC decision acted upon may be one that is inter partes or of a general scope. The Governor in Council's order is binding on the CRTC and on all parties.

Section 64 is a broader power for Cabinet than is s.23 because s.23 does not allow the Cabinet to substitute a different decision for that of the CRTC, whereas under s.64 it can. As a result, s.23 preserves the decision-making power of the CRTC more than s.64 does.[97]

The ability of Cabinet to send back for reconsideration and hearing and the possibility of it setting aside the reconsidered decision, could result in long delays before a final decision is made on a s.23 appeal. However, delays have not occurred because the CRTC and Cabinet have been flexible enough with each

other to not allow the matter to be delayed through all the channels.[98] Under s.64, long delays could also exist, for there are no time limits specified for appeals, therefore, Cabinet, on its own motion, conceivably could review a decision well after it is made.[99]

The ultimate effect of s.23 and s.64, is that they are simply a means of controlling CRTC policy after the fact, which it is submitted, is an unsatisfactory method of transmitting policy.[100]

(iii) Is the Cabinet Appeal An Appropriate Tool for Review?

Several commentators have questioned the propriety of Cabinet appeals and their ultimate effect on the credibility of the regulatory process and independence of the CRTC.

Numerous reasons have been put forth for suggesting that Cabinet appeals detrimentally affect regulatory agencies and detract from the integrity of the process.

Morale of Regulator

Allowing Cabinet to change a CRTC decision, after it has been carefully considered in light of the CRTC's legislative mandate, not only creates tension between the CRTC and Cabinet, but is unsatisfactory for it substitutes political convenience for a carefully

reasoned decision,[101] often for reasons extraneous to the facts and issues at the original hearing.[102]

Accountability

Cabinet appeals have been described as "selective accountability" because,

> "When it suits its political purposes, the Cabinet remains largely free to hide behind the excuse that the matter has been delegated to an "independent" regulatory agency... On the other hand, would politics so dictate, grounds can readily be found to justify intervention. The convenience of this arrangement for short-term political purposes is clearly incompatible with the development of either coherent regulation or political accountability in any meaningful sense."[103]

Arbitrariness

Arbitrarily overturning or rushing through a decision without providing parties any of the procedural safeguards recognized by the rules of natural justice, brings the validity of the process into question[104] and goes far to undermine the rationale for giving adjudicative tasks to an agency.[105]

Secrecy

The secrecy and flexibility of the proceedings leads to suspicions of abuse of power[106] and might appear to reward lobby groups that possess manipulative powers,[107] because to allow a political appeal of a judicial process mixes two incompatible notions - a

secret Cabinet meeting overturning an open board hearing.[108]

Lack of Clarification of Policy

Cabinet appeals may provide control for Cabinet, but they may not actually result in a clarification of policy. They could lead to uncertainty over what the policy actually is[109] because no reasons are articulated, consequently there may be no way to determine whether the decision is a shift in policy or merely an isolated decision. As well, since Cabinet decisions are not binding precedents on the CRTC, CRTC policy could continue in spite of a contrary decision.[110]

Timeliness

The decision comes so late in the process that it not only delays and throws uncertainty into the process, but it is destructive of the system for the sake of short-term political goals.[111] It can lead to parties approaching the agency less conscientiously in the future[112] and can demoralize the agency, ultimately affecting the quality of decision-making and the quality of persons willing to serve on the tribunal.[113]

In conclusion, for all the reasons above, it is anomolous to give a regulatory body independence to function and then provide for statutory political appeals.[114]

In spite of the extensive criticism of the appeal process, some reasons have been suggested that the process is not inappropriate.

Extraneous Factors

The CRTC only takes into account factors presented at the hearing and is not expected to account for other government concerns. The agency's duty is not to worry about making trade-offs (e.g. economic benefits for one region versus another), only Cabinet is entitled to make these decisions.[115]

Complimentary Process

The process is not destructive nor does it tarnish the integrity of the system, because appeals do not occur frequently and most are not successful.[116]

Responsibility

Some decisions are so important that government must be involved, otherwise it would be abdicating its responsibility for major policy-making.[117]

Cost-benefit

The political appeal power does affect the independence of the agency, but it does not result in much loss of independence, for the agency still continues to exercise a considerable degree of discretion. The appeal power is similar to an appellate court overseeing the decisions of a lower court without denying the lower

court its independence.[118] As long as the independence of the agency is not stifled, the benefits of the appeal out-weigh the disadvantages.

3. IS THERE POLITICAL ACCOUNTABILITY FOR GOVERNMENT ACTIVITY?

One of the important considerations from the discussion on Cabinet appeals and directions is whether the processes allow for accountability in the government or protect the public interest.

Traditionally, policy-making has been considered to be the responsibility of elected officials who are accountable to the legislature and the electorate. As indicated, the CRTC has taken on much of the policy-making responsibility and since it is a body functioning outside of the Minister's department, it performs the responsibility beyond ministerial control. Consequently, elected officials have attempted to maintain control and political accountability through the process of cabinet appeals.[119]

The issue of accountability of regulatory agencies has been central to several recent public sector studies on regulatory reform. The main vehicles for accountability, namely the direction power and the political appeal, have inspired considerable study and comment from both government commissions and individual

commentators.[120]

The prominent recommendation appears to be that the existence of both a review and direction power may be unnecessary. If the direction power remains, as it seems it will based on the government proposals to entrench it more deeply into the regulatory process, then Cabinet appeals should be abolished.[121] One study has qualified the statement by adding that a limited right of appeal should exist if an agency ignores or misapplies the direction.[122]

The reason for the recommendation to abolish appeals is obvious. If Cabinet is able to issue directions on policy matters and then also has the right to review individual decisions, the agency loses its independence.[123] And, as has been made clear, the advantage of permitting agencies to be independent is that they prevent the system from becoming overly political where a "short term political gain is substituted for a sound long run strategy."[124]

Besides, if Cabinet holds itself out has having reconsidered the matter, while realistically the regulator or department reconsidered it and then made a recommendation to Cabinet that was accepted by it,[125] or if Cabinet is not going to spend the time to decide a matter properly, then it should not have the power to

make the decision.[126]

It has been suggested that parties are aware that the chances of winning an appeal are slim, therefore, the real reason for appealing to Cabinet is to put pressure on the bureaucracy. From the party's (e.g. Bell Canada) viewpoint, the important thing is that the policy gets changed, therefore, even if the appeal is dismissed, but the policy ultimately is amended, then they have been successful in acquiring their purpose.[127] If this is an accurate assessment of the reason for appeals, then there is no need for Cabinet appeals, effective lobbying could produce the same results.

The consensus from the studies and commentary also appears to be that major policy decisions should stay with the government and should not be allocated to the agency to perform. The directive power should be employed more to instruct agencies respecting policy,[128] for the power is particularly suitable for guiding the agency's policies. But, the way directions are made now lacks the openness that allows the public to view government action and make representations. The process should offer opportunity for interested persons to participate in policy making.[129]

If the creation of policy through the use of directives is made more open to the public by allowing

for submissions, public hearings and debate to take place, then directives could be more productively employed and would be a much more effective means of maintaining political accountability than through Cabinet appeals. The advantage of directions is that they force the government to formulate policy in advance rather than responding in an ad hoc manner.[130] As such, they provide a satisfactory compromise between the need for political control and the benefit of having independent administrative decision-making.[131] If the directive power is used responsibly, it is not incompatible with the notion of an independent agency.

The exercise of the power to issue directions also could be subject to checks to provide for political accountability. For example, prior to issuing a policy direction the agency could be required to receive submissions or conduct a public hearing on the proposed policy to allow interested parties to articulate their views.[132] Then the agency could present a recommendation to Cabinet for their consideration.[133] Even after a direction is issued, accountability could be maintained by allowing a Parliamentary committee to examine it and revoke it if they did not approve of it.[134]

It is trite to mention, but it is important that safeguards be implanted to prevent the executive

from unilaterally altering or amending laws, for it is incongruous to permit the executive to make matters lawful that a statute would not sanction.[135] This comment applies to both direction and review powers.

In conjunction with, or in place of directives it should be incumbent on the government to put policy guidelines, along with any criteria for consideration and any limitations, into formal legislation. It is acknowledged that it is difficult to cultivate policy in advance - realistically policy is like the common law, it builds on different facts and cases, and to that extent will always be somewhat ad hoc[136] - but attempts should be made to clearly set out legislative aims. The recourse is always available to amend the legislation to maintain government control over the exercise of policy by agencies.

Even though the abolition of Cabinet appeals has been advocated, it is possible to justify some degree of Cabinet review, since Cabinet is ultimately accountable to Parliament and the public for decisions of agencies, but it should be exercised according to prescribed standards set out in legislation.[137] If the appeal process does not result in some predictability and uniform enforcement, credibility in the process is lost.[138]

For reviews by Cabinet, the type of procedures that could be adopted to safeguard interested parties might include implementing a process to require public notice of a petition; insisting on representations from parties being made available to others; and following the decision, reasons for the decision plus the representations from parties being submitted to Parliament for perusal.[139]

If Cabinet appeals are not abolished then there is urgent need to amend the review powers, for not only does the current legislation not provide any procedural formality or safeguards for interested parties, it is without logical rationale. In some cases Cabinet can completely reverse a CRTC decision on telephone rates, yet it has no power to overturn a refusal of a broadcasting licence. Cabinet may have no control over the CRTC making a regulation, yet it can overturn an individual decision of the CRTC based on that regulation. Clearly, there are inconsistencies which require review to provide for harmony both in the scope of the power and in the procedure to instill credibility in the regulatory process.[140]

4. EXAMPLES OF THE GOVERNOR IN COUNCIL'S REVIEW OF CRTC DECISION-MAKING

As an illustration of the effect Orders in

Council have had on the CRTC, the decisions of Cabinet which overturned or set aside CRTC decisions have been set out and discussed.

(a) The Manitoba Cable Agreement

One of the two most celebrated instances of Cabinet review involved the Manitoba - Canada Cable Agreement, not only because it was the first case where Cabinet set aside a CRTC decision, but because of the implications of the action on the constitutional authority over telecommunications in Canada.

The provinces, especially those with provincially owned telephone systems, generally have not wanted control over radio or TV, but have for cable TV because of the local nature of the coaxial cable running along municipal rights of way. They have wanted control over cable not only because of its local characteristics but because they were concerned that the cable system was able to be used for more than just broadcasting, it could distribute non-programming services capable of competing with the provincially regulated telephone carriers.[141] Another reason for wanting control was to ensure province-wide coverage for the medium by requiring that the telephone system own the distribution hardware, rather than the cable operations.[142]

The federal government wished to control cable primarily because it believed that cable could be used to guarantee the orderly development of broadcasting in Canada in spite of the threat posed by increased American programming. The government was willing to negotiate with the provinces to allow them jurisdiction over some aspects of cable regulation if control over programming remained with the federal government.[143]

In the 1970s the federal government began serious negotiations with the provinces over communications. Throughout its negotiations with Manitoba the federal government's only concern was broadcasting, they exhibited little regard for the cable potentially becoming a general distribution system for telecommunications.[144]

In 1975, the CRTC called for applications for cable licences in the province of Manitoba.[145] At that time the CRTC policy dictated that when cable companies arranged with telephone companies for the use of their poles and ducts for laying cable, the cable outfit should maintain ownership over a substantial part of the hardware (at least the headends, amplifiers and drops) as a means of retaining control over their systems, to allow them to remain an integral part of the broadcasting system, as opposed to becoming merely

another mode for delivery of signals.[146]

In September, 1976, the CRTC awarded cable licences[147] in accordance with their policy, but the Manitoba government petitioned Cabinet to set aside the decision because of the ongoing negotiations over cable between the governments.[148] The Governor in Council acted on November 10, 1976, to set aside both decisions pursuant to s.23 of the Broadcasting Act.[149]

On the same day as the Order in Council, the governments of Canada and Manitoba announced an agreement whereby Manitoba recognized exclusive federal jurisdiction over all programming services on cable systems (including closed-circuit and Pay TV), while provincial jurisdiction was recognized for all telecommunications services, other than programming, distributed by the Manitoba Telephone System (MTS).[150]

The agreement was significant not only because it allowed cable operations to lease hardware from MTS rather than acquiring it themselves, contrary to CRTC policy, but the provincial regulatory authority (the Public Utilities Board) was given jurisdiction to adjudicate any dispute between MTS and cable operations over terms, conditions and rates for the use of facilities.[151] A recent Order in Council from the Lieutenant-Governor in Council of the Province of

Manitoba perpetuates this term of the agreement allowing for MTS to adjudicate disputes.[152]

The agreement was taken by the provinces as a signal that the federal government was committed to its policies, yet was willing to cooperate with the provinces by granting them a greater share in telecommunications regulation.[153]

Following the Order in Council, the CRTC was advised to take the terms of the agreement into account when reconsidering new licences for the areas affected by the order. Since the CRTC was not privy to the agreement it was not legally binding on them so they could have chosen to ignore it by continuing to impose their ownership policy; but, Cabinet had already shown its intention to set aside decisions not in conformity with the agreement. Consequently, the CRTC withdrew their ownership policy and called for new licences, which were subsequently issued to accommodate the provincial position.[154]

As a result of all this, the provincially owned telephone system owns most of the cable companies' plants and leases channels on the coaxial cable to cable licensees. But the CRTC has continued to affirm their policy in part, by requiring that the new licensees still own some of their equipment.[155]

It is obvious that the governments expected the CRTC to automatically implement the agreement, so before acquiescing to its terms, the CRTC reminded them that the discharge of its duty could only be performed in conformity with the Broadcasting Act, it could not perform it in a selective manner.[156] The fact that political authorities collaborated and instituted public policies which may or may not have constitutional or parliamentary sanction, does not mean that an agency must automatically abide by its terms without regard to its legislative mandate and[157] the CRTC acted properly in bringing this to the attention of the government.

It may be that the CRTC refusal to change their policy was more than merely being insensitive to provincial concerns and to the delicate nature of the negotiations for the Minister; it was more concerned with asserting its independence to challenge allegations of political control.[158]

One important aspect of the incident for any future proposals respecting jurisdiction over telecommunications, especially in light of the joint panel proposal mentioned earlier, is that the regulatory agency should be a party and signatory to any agreement between governments,[159] not only to maintain its independence but to ensure the smooth implementation of

the agreement.

(b) The Telesat - TCTS Agreement

On December 31, 1976, Telesat Canada and TCTS (now Telecom Canada) signed an agreement to include Telesat as a member of the TCTS system. Subsequently, Telesat applied to the CRTC, as required under s.320(11) of the Railway Act, for approval of the agreement. [160]

The CRTC refused to approve the agreement because it found that it raised a substantial likelihood of undue preference to TCTS members contrary to s.321(2) of the Railway Act, and would significantly prejudice the capacity of the CRTC to adjudicate complaints of unjust discrimination under the Railway Act. The CRTC stated that human motivation coupled with economic needs of TCTS members would result in subtle undue preference being extended to its members unless extraordinary precautions were taken. In addition, from viewing the provisions of the agreement, real advantages for members were observed. For example, TCTS carriers could designate earth station sites and Telesat could have satellites designed to be compatible with TCTS economic and performance requirements and service plans. As a result, the combination of the inherent advantages and those in the agreement led to the substantial likelihood of undue advantage or preference. [161]

Secondly, only allowing complete channels to be leased limited access to Telesat to very large users, while further restrictions on the channels limited consortia from leasing channels. Consequently, TCTS members received a real advantage over other potential Telesat users.[162]

Thirdly, the TCTS-Telesat relationship would make it very difficult for the CRTC to investigate into allegations of undue preference or discrimination regarding other carriers, making regulation in accordance with s.321(2) difficult.[163]

For all the reasons above, the CRTC concluded that approval should be denied.

The decision was appealed to Cabinet by Telesat Canada and a few carriers under s.64(1) of the National Transportation Act. On November 3, 1977, Cabinet reversed the CRTC decision[164] after determining that the public interest would be better served by permitting the agreement and after finding that the agreement would not contravene any statutes, namely the regulatory powers under the Railway Act or the Minister's power to operate earth stations under the Radio Act.[165]

It has been suggested that in effect, the Cabinet permission allowing Telesat to join TCTS has ensured a complete monopoly on long distance voice

transmission for TCTS members.[166]

A news release issued by the Minister of Communications accompanied the decision and stated that,

> "the action just taken was dictated by broad issues of public policy, which lie beyond reasonable purview of the CRTC. ... This action reflects the broad policy of the government with respect to fostering satellite communications service for Canadians."[167]

It might be that since statutory mechanisms (Cabinet directives) were not available to dictate policy prior to the decision, Cabinet was forced to act after the fact.[168]

However, it is interesting to note that prior to the signing of the agreement, the Minister of Communications forwarded a letter to the Chairman of the CRTC setting out points which she felt should be considered by the CRTC in determining whether to approve the agreement, and indicated that the government considered the agreement acceptable subject to certain considerations.[169] The CRTC chose to disregard the persuasive nature of the letter and proceeded to evaluate the matter solely on the basis of protecting the public interest. Obviously, Cabinet did not approve of the independence exhibited by the CRTC and subsequently overturned their decision.

The Cabinet action has been severely criticized

as a destructive action because it changed the rules of the game after it was played, resulting in disillusionment both to those involved as parties to the process and to the CRTC, whose independence came into question.[170]

The concept of political accountability was not criticized, simply the method employed. As one author noted,

> "It is difficult to envisage a more unsatisfactory situation than the one in which a regulatory agency is placed in the predicament of having to make a decision while knowing that it could be promptly reversed for failing to take into account considerations never communicated to it."[171]

In the end, this episode provides a prime example of Ministerial intervention in the administrative process right from prior to the application to the CRTC for approval, through to the Cabinet decision itself.[172]

Following the Order in Council, the CRTC displayed its displeasure with the Cabinet action by releasing a statement on November 4, 1977, advising that in light of the problems they would face attempting to carry on effective rate regulation and discharging its obligation under s.321(2), a full review of the operations, finances and practices of TCTS and its individual members would be required.[173] Therefore, the

CRTC assertion of independence and its resolution to perform its mandate, led to the TCTS rate inquiry and further conflict with Cabinet.

(c) The TCTS Rate Inquiry

There is a regulatory void concerning TCTS rates because of the impact on other jurisdictions if one regulator denies or alters its system's rate change, but the CRTC took the initiative to try and fill the void after Bell Canada and B.C. Tel filed applications for approval of a TCTS rate increase in the spring of 1978.[174] Upon receipt of the applications the CRTC asserted that the volume and complexity of TCTS matters had grown to the point where they required study in a separate proceeding.[175] Besides, after the Telesat-TCTS incident, the CRTC was determined to investigate into TCTS operations.

Consultants were hired by the CRTC in December, 1978, to report on the Revenue Settlement Plan for the division of revenues among TCTS members. Then the CRTC announced that interested parties should reflect upon several issues that needed to be considered at the public hearing.[176] The issues included: whether settlement procedures for TCTS members were fair and reasonable and in the best interests of subscribers and the public; whether cross-Canada rates were just and reasonable; and

whether TCTS and Telesat Canada were responsive to transmission of programming services at reasonable costs.[177]

In its decision following the hearing, the CRTC stated that they were obligated to examine the reasonableness of rates in accordance with s.321 of the Railway Act; the fact that the TCTS members unanimously agreed to the rates was not sufficient to demonstrate that rates were just and reasonable.[178]

After carefully considering Bell and B.C. Tel's positions respecting a need for rate increases, the CRTC decided that there was not sufficient direct evidence to support the need for additional revenues.[179] In addition, they ordered Bell and B.C. Tel to renegotiate aspects of the Revenue Settlement Plan with the other members of TCTS. For example, they were ordered to negotiate a settlement to eliminate the inequities to subscribers from the treatment of international long distance calls which resulted in excessive revenue gains for the carriers.[180]

With regard to satellite matters, the CRTC reiterated its concerns from decision 79-10 (the decision denying the TCTS-Telesat agreement) respecting the inherent discriminatory aspects of the TCTS-Telesat relationship, but was powerless to reject the

relationship, because of the Governor in Council's approval of the agreement.[181] However, there were two aspects of the TCTS-Telesat Connecting Agreement that were considered objectionable by the CRTC.

First of all, the agreement restricted the customers able to lease satellite space, resulting in discrimination against some actual or potential users contrary to s.321 of the Railway Act. Accordingly, the item of the agreement limiting the customer base was disallowed because costs to some users would be greater than for Telesat services leased to TCTS carriers.[182] Therefore, Telesat was ordered to offer satellite transmission services directly to all customers rather than only to common carriers[183] thereby allowing both businesses and broadcasters to deal with Telesat directly for its services.[184]

The second aspect of the agreement which the CRTC disallowed was the Telesat policy to only lease full channels to customers. This practice discriminated against smaller carriers because only large carriers, and in particular TCTS members, would be able to lease the channels, providing them with an undue advantage contrary to s.321(2) of the Railway Act. Consequently, Telesat was ordered to offer partial channel services.[185]

TCTS members petitioned Cabinet under s.64(1)

National Transportation Act to have the decision set aside. In a decision announced on December 8, 1981 Cabinet upheld part of CRTC decision 81-13, but set aside the part of the decision respecting Telesat's relationship with TCTS. In particular, Cabinet set aside the aspect disallowing the agreement's customer base and the order that Telesat offer partial channels.[186] Therefore, Telesat was allowed to offer whole channels directly to broadcasters and common carriers only and partial channels to common carriers.[187] In effect, Cabinet was asserting its intention to reinforce its earlier policy decision to allow the agreement between Telesat and TCTS, in spite of the inherent discriminatory nature of the relationship and limit the independent decision-making of the CRTC over the relationship.

The provincial perception of the CRTC investigation into the TCTS agreement was that the CRTC was attempting to expand its role and extend its jurisdiction. The inquiry into TCTS matters was viewed as not merely attempting to determine the fairness of TCTS settlement for the federally regulated carriers, but as an attempt to regulate the entire TCTS settlement process over interprovincial rates.[188]

Provincial carriers were concerned for the decision symbolized how a unilateral regulatory decision

could cause repurcussions affecting all other regulatory agencies, because the effect of the decision was to order renegotiation of aspects of the agreement for all TCTS members.[189] The Cabinet decision did not set aside this portion of CRTC decision 81-13.

At the CRTC hearing, CNCP argued that the existing system did not allow even competition in interprovincial telecommunications services. It was suggested that divided authority over TCTS puts non-members at a disadvantage because TCTS members are able to cross-subsidize to compete with other carriers. Therefore, unless the CRTC controls all TCTS members, they are unable to prevent cross-subsidization and are unable to regulate according to their mandate set out in s.321 of the Railway Act. In this respect, the proceeding indicated the importance for any future rearrangement of jurisdiction over all telecommunications in Canada, to establish a regulatory structure which is acceptable to all TCTS members.[190] It also points out the precarious situation for provincial governments, because there are sound reasons for accepting federal control over all telecommunications, to allow for coordinated regulation from a central agency.

(d) The Limiting of Rate Increases to 6 and 5%

In the June 28, 1982 budget speech, the

government requested that all federal regulatory agencies follow the objectives of the budget by limiting rate increases to no more than 6 and 5% over two years, except in exceptional circumstances. In response to this, the CRTC issued a public notice on September 2, 1982 advising cable licensees that the government was intending to scrutinize all CRTC rate decisions, therefore, if the rate increase applied for exceeded 6 and 5%, they should be able to clearly justify it.[191]

As expected, all telecommunications carriers and cable TV rate applications in excess of 6 and 5 were scrutinized and acted upon by the Governor in Council. Numerous decisions of the CRTC have been varied under s.64(1) by the Cabinet, on their own motion, to limit rate increases for telecommunications carriers to not more than 6 and 5%.[192] As well, in some cases involving broadcasters, Cabinet acted under s.23(1) to either refer the matter back to the CRTC for reconsideration of circumstances justifying exception to the policy,[193] or simply set aside decisions which allowed installation rate increases in excess of 6 and 5.[194]

This situation provides an overt example of Cabinet directly interfering with the regulatory process to effect a desired government policy, even if the

regulatory agency has seen fit to permit increases in excess of the policy.

(e) Pay Television

Since the issuing of six broadcasting licences on March 18, 1982,[195] for the provision of Pay television services in Canada, there have been three petitions to Cabinet under s.23 of the Broadcasting Act to set aside or refer back for reconsideration decisions of the CRTC.

The first petition questioned whether it was appropriate for the CRTC to require First Choice Canadian Communications Corp. (one of the original six licences granted in decision 82-240 on March 18, 1982) to provide a national general interest service in English and French, 24 hours a day for seven days a week. Cabinet refused to set aside or refer back the decision.[196]

The second petition arose after the CRTC amended a condition of the original Pay TV decision (82-240, issuing licences to six applicants) to provide that the expenditure requirement to be spent on Canadian programming was to be averaged over the five year term of the licence,[197] instead of in each of the five years. Cabinet intervened and set aside the CRTC decision, thereby requiring an annual commitment to Canadian programming.[198]

The third petition involved a decision by the

CRTC on July 27, 1983, to amend Allarcom Limited's regional general interest service licence for Alberta, to authorize it to extend its services into Saskatchewan, Manitoba and the North West Territories.[199] The decision was referred back to the CRTC for its reconsideration of two specific matters:

1) did the decision place Allarcom in an enhanced position to that foreseen in decision 82-240, to compete with the national general interest licensee without being subject to the same requirements (e.g. service in French); and

2) to consider the role of a regional interest licensee in light of the overall market structure of Pay TV in Canada.[200]

After a public hearing on November 29, 1983, to consider the matter, the CRTC re-evaluated its earlier decision in light of the concerns set out in the Order in Council and confirmed its decision without any changes.[201]

In coming to its decision, the CRTC stated that it considered the size of the market (which only represented 6% of cable subscribers in Canada) and decided that a pay system on its own would not be economically viable for service to Saskatchewan, Manitoba and the North West Territories without allowing the costs to be shared over a larger subscriber base. The fact that there was no other applicant for the service verified the economic risks involved.[202] Also, being

able to benefit from economies of scale ensured that Canadian content requirements would be fulfilled.[203]

Furthermore, the decision was consistent with the role and obligations expected of a regional general interest licensee, because Allarcom was expected to produce programming in each of the provinces and to establish separate production funds to be spent in each of the provinces. In this way, the decision was consistent with the policy set out for the Pay TV industry in Canada in decision 82-240.[204]

The Cabinet has not acted to set aside the CRTC's recommendation of the decision pursuant to s.23(4) of the Broadcasting Act, therefore, presumably it is not displeased with the CRTC's reconsidered decision.

5. CONCLUSION

The Governor in Council appears to have restricted CRTC independence by expanding its review of CRTC decisions, in an apparent attempt to alter the functioning of one of the only independent regulatory agencies in Canada. The interference may not be excessive yet, but it certainly has increased in frequency.

Interfering with established CRTC policy arrived at after public hearings and public input, has tarnished the CRTC's independence and has tainted the

agency's ability to respond to and adjudicate on problems as they arise. When the Governor in Council overturns a decision as relatively insignificant as whether the Pay TV expenditure on Canadian programming should be calculated annually or over the five year term of the licence, then Cabinet has gone beyond merely acting in landmark instances, to overseeing all aspects of CRTC activity.

The Commission cannot ignore these intrusions and surely any decision is now made by trying to adjudicate on the issue before them yet trying to foresee Cabinet's reaction to it. This attitude is inconsistent with the detached and self-assured professionalism that is necessary to properly perform the duties of the CRTC. Frequent Orders in Council can only detract from the capable duty being performed.

An unfortunate aspect of constant overseeing is that there will not only be a loss of confidence in CRTC action, but a much less ambitious approach taken towards reviewing matters. The process of conducting public hearings and extending an effort to receive public input before adopting policies to approach decision-making, will be futile if Cabinet steps in and imposes its decision irrespective of public interest considerations.

It is apparent that CRTC decisions have

incorporated the public interest as a primary factor in decision-making. For example, in the Telesat-TCTS and the Rate Inquiry decisions, clearly there were discriminatory factors present and the public interest was not being served by allowing the activities to continue. The Cabinet decision to overturn the CRTC in these cases, could not have been made with the interest of the public in mind; they were motivated by extraneous factors not communicated to the public. Since no reasons were given, it can be assumed that lobbying and pressure from the huge corporate entities involved could have exerted sufficient influence on Cabinet.

To reiterate a point expressed earlier in the paper, it is incongruous to provide the CRTC with more independence than any other agency in Canada, in order to permit its knowledgeable and professional competence to oversee the day-to-day operations of broadcasting and telecommunications with a view to protecting the public interest, and then supply a few selected politicians with the power to review and overturn any CRTC decision, without any procedural or substantive guarantees that the public interest has been accounted for.

Why has the Governor in Council reviewed the CRTC more in the last few years than in the past? Several reasons could be attributed to it.

First of all, the government has been willing to accommodate provincial claims for more jurisdiction than in the past.[205] For example, the CRTC policy concerning cable was incompatible with government negotiations, consequently the CRTC decision was adjusted to conform with the government's approach towards negotiations with the provinces.

Secondly, the government has shown a desire to more closely control communications policy.[206] As international aspects (e.g. satellites) of communications become more prominent and technological advancements enhance the interprovincial nature of the industry, more centralized control is appropriate and desirable.

Thirdly, consumer groups and other interested parties are taking more of an interest in the decisions of government. As the public hearing process expands, more people become aware of communications issues and with the CRTC's encouragement for public participation in making submissions and appearing at hearings, more citizens are becoming involved.

Finally, the recent decisions of the CRTC have been of far greater magnitude than in the past. The Commission itself has proclaimed in several cases (Telesat-TCTS; CNCP-Bell Interconnection) that their decisions could conceivably affect the structure of all

telecommunications in Canada. Yet the CRTC has been left on its own to determine these crucial issues because there has been no guidance from the government in the form of policy statements; no statutory assistance respecting objectives or tests to employ; and there exists no directive power for the government for telecommunications matters to allow it to express its concerns to the CRTC. If the CRTC decision on a crucial issue does not reflect government opinion, then the review power is the only mechanism left for it to employ.

The Cabinet appeal is not an appropriate mechanism for directing policy, nor is it always appropriate for protecting the public interest. However, the exercise of political controls can contribute to the effective use of regulatory agencies by the government and the use of Cabinet as a central coordinating organ for government policy is important.[207] But, if the CRTC is to lose its independent status, the controls must be properly set out and employed. Rather than arming Cabinet with the appeal power, it would be more efficacious to provide them with additional direction-making powers.

More direction power in the government would lead to less CRTC initiated policy, but it is acceptable provided there is openness in the government's

policy-making process. If there is not an appropriate level of openness, then the CRTC's public hearing and policy-making procedures are more desirable to protect the public interest.

As a result, it would be appropriate to implement the suggestions to increase the government's power to issue directions, but only if accountability is maintained by providing for submissions, the holding of public hearings or promoting the legislation of policy guidelines and limitations.

The CRTC needs guidance to keep its actions in tune with government expectations for the evolution of communications in Canada. Cabinet appeals have maintained accountability over issues Cabinet felt were crucial, however, the use of the appeal has not been productive in assisting the development of communications policy. It is suggested that the use of directives and more formalized policy guidelines in advance would be a much better approach to directing CRTC action and maintaining accountability in the regulatory process.

ENDNOTES

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Administrative Procedure in the CRTC prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services, 1980), p. 83.

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36 Fremont, Protection of the Public Interest, p. 107.

37 However, in 1973, Cabinet did overturn a CRTC decision allowing a Bell Canada rate increase. See P.C. 1973-871 of April 9, 1973; P.C. 1973-1765 of June 21, 1973; and P.C. 1973-1827 of June 29, 1973.

38 Fremont, Protection of the Public Interest, p. 88. See also the list on pages 40-42 of Vandervort, Political Control.

39 Johnston, The CRTC, p. 84.

40 For examples of refusals, see P.C. 1983-3469 of November 3, 1983; P.C. 1977-2026, 2027 and 2028; P.C. 1977-1508; P.C. 1978-3577; and P.C. 1979-191.

41 Baum, "Broadcasting Regulation", p. 702.

42 Vandervort, Political Control, p. 29.

43 Section 27(2). One other direction power exists in the Broadcasting Act. Section 17 indicates that if the CBC and CRTC cannot come to an agreement concerning the propriety of conditions of licence imposed, then under s.17(3), the CBC can refer the condition to the Minister and he can issue a written directive to the CRTC regarding the dispute.

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46 C.R.C., c. 376.

47 See sections 4 and 5 for a definition of eligible corporations.

48 C.R.C., c. 377.

49 C.R.C., c.378.

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63 Bill C-20, 1984 (32nd Parl. 2nd Sess.), 1st reading

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74 Ibid., p. 63.

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79 Ibid., p. 62.

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CHAPTER 3

JUDICIAL REVIEW OF CABINET DECISIONS

Introduction

Before looking at the possibility for judicial review of Cabinet appeals it is helpful to describe the evolution of the duty of "fairness" in administrative law, to indicate its relevance to federal tribunals generally and then to ascertain whether it applies to Cabinet actions as well. The importance of "fairness" is that by opening up Cabinet procedures to greater scrutiny, hopefully the substance of Cabinet decisions will become more reviewable by the courts.

Moreover, the common law development of "fairness" is pertinent, for if one is not able to find a violation of the provisions of the Canadian Charter of Rights and Freedoms when asserting a claim for judicial review of a tribunal's action, then the procedural protection available to an applicant would be limited by the common law.

Therefore, this chapter will initially set out the common law position with respect to "fairness"; then discuss grounds for reviewing Cabinet action; and then illustrate the application of the Charter to actions of the Governor in Council.

1. "FAIRNESS" - BACKGROUND

Before rules of natural justice or procedural

protections could be invoked when a statute was silent respecting procedures, one had to demonstrate that the tribunal was performing a function that was either judicial or quasi-judicial; that a person's rights were being affected; and that good reasons existed for a hearing or procedural protections being imposed.[1]

It was necessary that a hearing made a final determination of a fact-law oriented question affecting individual rights. Investigative, recommendatory functions were not included, nor were broad, policy-intensive decisions. Also, a distinction between rights and privileges was fashioned: if one was denied a privilege as opposed to taking away a right, then there was no obligation to allow procedural fairness.[2]

"Quasi-judicial" was used as a basis for determining whether or not the common law required a hearing or whether rules of natural justice applied. The rules of natural justice had no application to administrative or legislative functions.[3]

A brief review of the terminologies should be set out before proceeding.

An administrative function has been described as:

> "the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case, in accordance with the requirements of policy or expediency or

administrative practice."[4]

An example of an administrative function would be the cancellation of a visitor's permit by the Minister when a spouse withdraws sponsorship for an individual.[5]

Quasi-judicial describes,

> "a function that is partly judicial and partly administrative...the holding of a judicial-type local inquiry and the consideration of objections. It may alternatively describe the "judicial" element in a composite function...or it may describe the nature of a discretionary act itself where the actor's discretion is not unfettered."[6]

In short, it is the judicial manner with which an administrative body investigates, holds hearings and draws conclusions.

The more closely a statutory body resembles a court's actions, the more likely that body will be considered to be acting in a judicial capacity. But even functions performed by courts are not always judicial. For example, a justice of the peace may perform ministerial duties, which are actions where there is no occasion to use judgment or discretion. Nevertheless, usually it is the degree to which the body's general characteristics resemble those of an ordinary court that is the major factor in determining the function of the body.[7]

A legislative function is one where an official acts with few restrictions on his discretion to decide matters. The purest form of legislative action has been described as the ability of the Governor in Council to act on his own motion, with no restrictions as to the manner of his action.

The rules of natural justice are based on two primary rules, audi alteram partem and nemo judex in sua causa.[8]

Audi alteram partem provides that a person has a right to be heard to make his point known. It includes the right to a formal hearing; the right to cross-examine; the right to an adjournment; the right to representation by a lawyer; and several other procedural rights that may vary depending on the circumstances.[9]

Nemo judex in sua causa provides that a person has the right to be treated impartially and be judged by individuals who are free of bias. Included in its parameters is the reasonable apprehension of bias because of a conflict of interest; the person deciding the appeal being the same as at the hearing; the same person being both prosecutor and judge and several other related situations.[10]

(a) The Duty To Act Fairly

In the late 1970s, a series of cases began to be less rigid in their approach to the functions test and dissenting opinions began reflecting a duty to act fairly irrespective of the function.[11]

Then, in 1978 in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police,[12] the majority of the Supreme Court of Canada determined that even though the function was purely administrative and not judicial or quasi-judicial, the decision-maker still was obliged to act in a procedurally fair way, but that the type of hearing required could vary depending on the function being exercised.[13]

In Nicholson, a probationary police constable was dismissed without being told why and without being given an opportunity to make representations. The court found that he should be treated fairly, not arbitrarily even though he was not entitled to all the procedural protections accorded to a full constable. The Police Act specifically excluded its procedural protections for the probation period, so it was an administrative rather than a quasi-judicial power which resulted in his dismissal.[14] Notwithstanding that the period of employment was brief, the status of the office deserved minimal protections, therefore, he should at least have been given reasons for

his dismissal and an opportunity to respond to them.[15]

The court stated that classifying statutory functions as judicial, quasi-judicial or administrative was difficult and to allow procedural protections for some functions and denying them for others was unjust, considering that the result of the statutory decision often had the same serious consequences for the individual, regardless of the classification of function.[16]

Two views of "fairness" emerged out of Nicholson. One suggested that it was still necessary to classify function to determine which of two distinct categories of procedural rules should apply. The rules of natural justice would apply to judicial or quasi-judicial functions and the lesser standard of fairness would apply to administrative functions, for the procedural protections required in administrative functions are not the same as for a trial-like hearing.[17]

The other view was that natural justice and fairness are not two distinct categories. Fairness, which lies behind the rules of natural justice, dictates that aspects of the rules apply to other than judicial or quasi-judicial functions.[18] Consequently, one would not need to classify functions before applying procedural

protections.[19]

One should simply accept that some fairness is implicit in any proceeding and depending on the type and formality of the proceeding and the seriousness of the consequences to the party involved, a determination should be made as to the amount of procedural protection required to produce a fair process. Whether there is an obligation on a tribunal to hold a hearing, and what type, might depend on the context in which the statutory power was being used. Therefore, the procedures would not always be the same, they would depend on the facts of each case.[20]

Since the purpose of a duty to be fair is to allow a person a chance to explain the situation to give a board all the information it needs to make a decision,[21] the advantage of "fairness" is that it allows a judge to impose a lesser standard on the tribunal, if they cannot be convinced to impose the procedures required by natural justice.[22]

The importance of Nicholson is obvious, for it frees the courts from the traditional tests for natural justice; the classification of functions is no longer a prerequisite for judicial review of procedures by which statutory decisions are made.[23] Also it shows that

procedural requirements vary considerably and allows the court to question whether there is any utility in requiring procedural protections in the case rather than determining the function.[24]

The approach taken in Nicholson was confirmed in Martineau v. Matsqui Institution Disciplinary Board,[25] when the court found that it was no longer necessary to find a quasi-judicial function for the judiciary to have jurisdiction to supervise administrative procedures.[26]

An inmate at a federal penitentiary applied to the court for review of a sentence imposed by the prison disciplinary board for a disciplinary offence. The court found that even though the board was discharging an administrative task and not conducting a judicial proceeding, it was still subject to the duty of fairness.[27]

> "A purely ministerial decision...will typically afford the individual no procedural protection... Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making process with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in Nicholson. In

> these cases, an applicant may obtain certiorari to enforce a breach of the duty of procedural fairness."[28]

Mr. Justice Dickson suggested that it was wrong to regard natural justice and fairness as distinct and separate standards and to try and define the procedural standards applicable to each. Fairness involves compliance with some of the principles of natural justice; it means a duty to observe the rudiments of natural justice when exercising an administrative function.[29]

The duty to be fair could be described as applying to all decision-making activities while natural justice merely sets the requirements for adjudicative situations.[30]

> "In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claimed to be aggrieved?"[31]

Therefore, after Martineau it was felt that there would be no more need to distinguish between fairness and natural justice.[32]

Recent decisions confirm that the Nicholson approach is being followed and suggest that courts still look to the function being performed and then apply the appropriate procedural protections. Whether the

classification of the function is done out of habit or merely to identify why fairness has been applied is open to question.

An example of the manner in which fairness has been employed is depicted in the three cases which follow.

In Re Fleming and Commissioner of Ontario Provincial Police, a special constable was not entitled to the disciplinary process set out in the regulations, but even though the decision to terminate was administrative, the applicant was entitled to some procedural protections; namely, to either orally or in writing respond to the reasons for termination.[33]

Re Ruiperez and Board of Governors of Lakehead University concerned a situation of alleged procedural unfairness before the promotion and tenure committee involving a professor who was not given the opportunity to respond to allegations against him. The sources of the allegations did not need to be identified, but, for a fair hearing, the substance of the information and an opportunity to respond was required.[34]

In Ho Foo Tam v. Minister of Employment and Immigration, a visitor to Canada who stayed on, was arrested and subjected to a deportation inquiry. He was

granted an adjournment to seek an exemption from the Governor in Council to stay in Canada. The inquiry was reconvened and a deportation order made prior to the Governor in Council's decision. Even though the matter was the exercise of a purely administrative function, there was still a duty to proceed fairly, therefore the order was set aside.[35]

2. DOES "FAIRNESS" APPLY TO THE GOVERNOR IN COUNCIL?

Procedural fairness has been an important achievement in administrative law which extends the protections of the concept of fairness to individuals affected by decisions, previously unreviewable because they were administrative matters.[36]

The two leading cases, Nicholson and Martineau, mean that practically nothing is outside the purview of the courts,[37] which would appear to bode well for parties wanting to challenge Cabinet decisions. It would make Cabinet procedures more accessible to court review and eliminate some of the secretive nature of Cabinet decision-making. It is not suggested that all Cabinet functions be opened up to public scrutiny, but when Cabinet sits as an appellate body pursuant to statutory powers, the activity should be subject to review. Conversely, if review is not acceptable, then the appeal

mechanism should be abolished (as recommended in the previous chapter) and leave the parties with recourse to the courts only for all appeal purposes.

However, the Supreme Court of Canada has suggested that of the continuum of decisions that can be made, some decisions may still be totally unreviewable, in particular, those of a purely ministerial or a purely legislative function.[38] As well, the leading pre-Charter case on Cabinet appeals, The Attorney General of Canada v. Inuit Tapirisat of Canada,[39] has tarnished the possibility[40] of "fairness" applying to Cabinet appeals by finding that an executive action is a legislative function not subject to natural justice or procedural fairness.

As a result, the seeming universal application of the principles espoused in Nicholson, may have been somewhat restricted.[41]

The Attorney General of Canada v. Inuit Tapirisat of Canada involved a CRTC approval of a new rate structure for Bell Canada. The respondent petitioned the Governor in Council under s.64(1) of the National Transportation Act to set aside the decision. While the respondent was preparing a reply to that filed by Bell Canada, the Governor in Council decided the

appeal and denied the petition.[42]

The Cabinet allowed no oral representations and the written submissions of parties were not presented to Cabinet, but the evidence and opinion of the Department of Communications and the CRTC were submitted to Cabinet.

The respondent brought an application to the Federal Court Trial Division alleging that they had not been given a hearing in accordance with the principles of natural justice.

The issue before the Supreme Court was whether there was a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s.64(1)?[43]

The court stressed that the mere fact that a statutory power was vested in the Governor in Council did not mean that it was beyond review. If Cabinet failed to observe a condition precedent to the exercise of the power, then the court could declare that purported exercise a nullity.[44]

> "However, no failure to observe a condition precedent is alleged here. Rather it is contended that once validly seized of the respondents' petition, the Governor in Council did not fulfill the duty to be fair implicitly imposed upon

> him...by s.64(1) of the National Transportation Act. While, after Nicholson, supra, and Martineau v. Matsqui Institution (No. 2), ... the existence of such a duty no longer depends on classifying the power involved as "administrative" or "quasi-judicial", it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness."[45]

The court reviewed s.64(1) to determine if the Governor in Council had operated within the law as laid down by Parliament and found that s.64(1) did not burden the executive branch with any standards or guidelines in the exercise of its review function. There were no procedural standards imposed or even implied. Had the Governor in Council refused to even examine the petition, then it would not be fulfilling its duty,[46] but that is quite different to demanding that Cabinet should go through all materials, including responses from all parties, before they can make a decision.[47] The nature of the body must be taken into account in assessing the technique for review adopted by Cabinet. In the past Cabinet could have acted by holding hearings with all parties appearing, but because of the volume of work now, it is neither practical nor possible.[48]

Since there were no guidelines for Cabinet to follow in s.64(1), its discretion was complete provided

it observed the jurisdictional boundaries in s.64(1). Consequently, the court found that "there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition."[49]

The Court based its comments on the case of Bates v. Lord Hailsham,[50] which emphasized that there was no implied right to be consulted or make objections, and there was no principle upon which the courts could enjoin the legislative process by contending that insufficient time for consultation and consideration had been given.

As a result, the court concluded that s.64(1) revealed no basis to introduce by implication the need to employ the Nicholson principle. The issue of fairness did not arise by the interpretation of s.64(1).[51]

The Inuit decision has been criticized for several reasons. First of all, the court looked at whether there was a duty to observe natural justice or fairness on the Governor in Council, even though Nicholson and Martineau determined that it was no longer necessary to classify the function as judicial or quasi-judicial before procedural obligations were required. In spite of admitting that it was not helpful

to classify the function, the Court proceeded to do it and then denied relief after determining that the executive action was a purely legislative function, not subject to natural justice or fairness[52] (the reference to Bates v. Lord Hailsham). To deny relief in this manner invites a return to earlier days when classification of function dominated judicial review.[53]

Considering that Mr. Justice Estey acknowledged the futility in characterizing functions and then relied on a finding of legislative function to deny relief, suggests that the decision may not be justified for the reasons given. It is likely that the court found that fairness could not arise because it was unwilling to impose procedures on the Governor in Council and it was anxious to avoid interfering in the political process.[54]

The political nature of the Cabinet's role was emphasized so as to imply that if there are policy oriented decisions in general, then procedural fairness cannot apply.[55]

Furthermore, it was not consistent with the trend of the court's earlier decisions to find that because s.64(1) did not include some indication of procedural rights (e.g. phrases such as "reasonable proof" or "sufficient cause") that procedural protections

should be automatically denied. The addition of phrases into s.64(1) would not automatically impose conditions precedent which would need to be met to allow relief, consequently, too much reliance may have been placed on the interpretation of s.64.[56] With its decisions in Nicholson and Martineau, the Supreme Court appeared to be beyond looking for technical reasons to deny relief.

It may be that Inuit will be interpreted as a case where the drafting of s.64(1) excluded fairness,[57] because it was essentially an interpretation of s.64(1) and did not really decide on the points espoused in Nicholson and Martineau. Inuit discussed the division of powers and the review of political questions rather than furthering the principle of fairness.[58]

It has been suggested that Inuit should be read narrowly to avoid another era of confusion as before over functions and perhaps it will be confined to the limited categories of decision-making given to the Governor in Council.[59] Even if it is confined though, it appears as if it will be effective to prevent review of appeals on telecommunications matters under s.64(1).

Shortly after Inuit, in The City of Melville v. The Attorney General of Canada,[60] the Governor in

Council, on his own motion pursuant to s.64(1), amended and varied orders of the Canadian Transport Commission (CTC) respecting passenger train services. The Cabinet order was made without going through a hearing and without any of the materials before the CTC, yet the court confirmed that Inuit firmly established that there was no requirement for procedural fairness on Cabinet when exercising powers under s.64(1). It must be assumed that the Cabinet decision was made in good faith.

The court stressed that Cabinet has been given the powers to enable them to respond to the political, economic and social concerns of the moment, therefore, as long as Cabinet acted within the jurisdictional boundaries and met any conditions precedent, the discretion is to be considered complete.

As a result, the extension of procedural protections for administrative decisions was advanced in Nicholson, but the courts have been reluctant to recognize procedural rights for legislative functions, such as those in Inuit and City of Melville. The one thing that is not clear from the decisions, however, is whether the denial of procedural rights applies to all Cabinet appeals, or just the appeals involving s.64(1).

The recent decision in Reyes v. Attorney

General of Canada may provide some indication of the Court's direction though, by holding that the Governor in Council is not subject to a duty of fairness when exercising his duties under s.18 of the Citizenship Act. Consequently, a person, who was not granted citizenship on the basis of the Governor in Council declaring that it would be prejudicial to the security of Canada, had no right to refute the information upon which the Governor in Council acted.[62]

Conclusion

The relevance of extending procedural fairness, when attempting to obtain judicial review of Cabinet decisions, is that if one has a statutory right to appeal to Cabinet and one chooses to exercise it, it is expected that Cabinet will legitimately review the matter. If Cabinet simply decides to accept a Ministerial recommendation and deny the appeal without reviewing any other submissions, then the appeal process is a sham. The only purpose for it is to allow Cabinet the opportunity to review and overturn matters it deems important. As a result, it is not the individual's right to appeal unless some procedural protections are instituted.

Since the appeal to Cabinet is part of the

legislation, it should serve a functional and real purpose or there is no point in its continued existence, which lends justification to the recommendations to abolish it.

3. GROUNDS FOR REVIEW OF CABINET DECISIONS

Grounds for reviewing Orders in Council are more limited than for other situations of judicial review, but there are some factors which can be considered to resolve whether review is possible.

(a) Jurisdiction

The general rule has been that an Order in Council could be reviewed if:

i) it is ultra vires; it does something beyond the purpose of the enabling statute; or

ii) a condition precedent has not been satisfied.[63]

Since review has traditionally been permitted for these jurisdictional grounds, it is important to look at the context of the statutory power to determine the nature of the power given to the Governor in Council.[64]

Naturally, the court is assisted in ascertaining the parameters of Cabinet's power if there are guidelines in the legislation for the exercise of the power. The court is more likely to deal with the case if guidelines exist, for then there are standards to apply

the facts to. If there are no guidelines, then the court is reviewing more of a political decision. Witness the result in Inuit where no guidelines existed. Therefore, if the court is able to find a jurisdictional defect, it will have a basis upon which to build its review.[65]

An example of the court reviewing the statutory jurisdiction for a Cabinet decision is found in Re Doctors Hospital and Minister of Health. The Lieutenant-Governor in Council acted pursuant to his statutory authority in the Public Hospitals Act to revoke the approval of certain hospitals. The court looked at the purpose for Cabinet closing the hospitals and decided that the closings were based on financial considerations which were beyond the objects and policy of the Act (which was regulatory in nature). Therefore, the decision had been made without jurisdiction and was void.[66]

The case of Re Williams and Attorney General for Canada[67] adds a hurdle for the successful review of Orders in Council by placing the onus on the applicant to show that the condition precedent had not been met.

The Governor in Council declared a rifle to be a restricted weapon in accordance with his power to classify weapons as restricted, if in his opinion, the

weapon was not reasonable for hunting or sport. In ruling on the challenge to the Order in Council, Mr. Justice Osler acknowledged that the Governor in Council's act was subject to judicial review because he fell within the definition of "federal board" in s.2 of the Federal Court Act.[68] However, the scope of the review was limited to determining whether Cabinet had some basis for the opinion leading to the decision.[69]

Provided that the Governor in Council held an opinion, the condition precedent for making the declaration was fulfilled and the court could not question the advisability or wisdom of their declaration. Furthermore, the onus was on the applicant to persuade the court that there was no basis for the opinion.[70]

The applicant was confronted with an obvious dilemma, for when Cabinet refused to supply the applicant with the information leading to the decision, and since no reasons were provided for the decision, the applicant was unable to convince the court that there was no basis for the Governor in Council's opinion because he did not know why the weapon was restricted. The ultimate effect of the decision is that it could make it virtually impossible to challenge an Order in Council.[71]

(b) Function

The nature of the function performed by Cabinet is pertinent, for after Inuit if the function is legislative the court will not interfere. However, the classification of Cabinet's function as legislative does not mean that it can never be reviewed. If the exercise of the power was ultra vires the granted power, then review would still be possible,[72] but this refers back to the jurisdictional limitations previously discussed.

With respect to other functions, as the classification of the function performed approaches administrative on the "continuum"[73] referred to in Martineau, then review becomes more possible. For example, the court in Coyle v. Minister of Education of British Columbia stated that Orders in Council could be legislative, administrative, executive or quasi-judicial depending on the function exercised by Cabinet when it made the decision. Therefore, when a school teacher was dismissed for incompetence and exercised a statutory right to appeal to a council made up of Cabinet Ministers, the function performed by Cabinet was quasi-judicial, consequently its decision was subject to review.[74]

(c) Procedural or Substantive Issue?

If the court has been asked to consider the procedural aspects of an Order in Council, it is more likely to intervene than if asked to rule on the substance of the order because substantive issues tend to be more politically, socially and economically related matters.[75] Of course Inuit limits the absoluteness of this comment, but some courts have placed procedural fairness obligations on Cabinet.

For example, in Gray Line of Victoria Ltd. v. Chabot, an Order in Council was issued after three members of Cabinet heard the statutory right of appeal to the Lieutenant-Governor in Council. The order did not specify who heard the appeal or who made the decision, therefore it was set aside and remitted to Cabinet for reconsideration because natural justice and fairness required that the members of Cabinet who made the decision should have been the ones to hear the appeal.[76] As a result the Lieutenant-Governor in Council was held to certain procedural fairness obligations.

(d) Individual versus the General Public

When reviewing Cabinet decisions a distinction has been made between whether the decision affects individual rights or the public in general. If more than just the parties involved are affected (e.g. the public

generally as with a Bell Canada rate increase) then the court is more likely to find that the function of Cabinet has been in its legislative capacity and, therefore, the court will be less likely to interfere.[77]

The distinction was made clearly in Township of South-West Oxford v. Attorney General for Ontario,[78] where the applicant sought a declaration that the Lieutenant-Governor in Council's decision was null and void because it had not been made in accordance with the principles of natural justice.

The court stated that all actions of Cabinet are not immune from the application of the principles of natural justice, some actions could be governed and others could not be. In Inuit, the actions were not governed by natural justice but the Court was able to distinguish Inuit because the nature of the proceedings stemmed from a rate-hearing (a res[79]) while the action before the court in this case was more "akin to a lis"[80] between parties.[81] Therefore the action was allowed to proceed to challenge the Order in Council on the basis of not complying with natural justice.

The court in Acro Pace Projects Ltd. v. Registrar of New Westminster Land Title District[82] considered which quality or characteristic it was that

determined where the administrative decision was on the "continuum"[83] between judicial and ministerial. It stated that the policy orientation of the decision was not the crucial factor because policy was involved in all decisions on the continuum. The important factor was the extent to which the decision adversely affected the interests of a person.[84] It was the potential impact of the decision on the legitimate interests of an individual which imposed the duty to act fairly on an administrator.[85]

Several other cases have responded in a similar manner. A Minister's decision to consent to the dismissal of a teacher for an indecent assault conviction, was seen as the exercise of a statutory power affecting an individual's rights, therefore, the Minister was compelled to act fairly, to the extent of providing reasons for the dismissal and an opportunity to respond.[86]

A Ministerial decision may be compared to Cabinet powers because courts have adopted a similar approach when reviewing the exercise of Ministerial and Cabinet powers. Courts have been reluctant to intervene in either case, therefore the significance of courts beginning to scrutinize Ministerial actions, is that

perhaps it indicates a trend to intervene into Cabinet matters as well.[87]

The decision in Coyle referred to earlier, also made the distinction between personal and public rights, by finding that there was an implied right to a hearing before Cabinet decided on the matter, because it was the dismissal of a teacher that was at stake.[88]

Conclusion

The four factors listed above may not be of assistance in all reviews of Cabinet decisions, but they do suggest that there are specific matters which courts have relied upon when determining whether or not to allow review of Cabinet powers.

4. THE CHARTER OF RIGHTS AND FREEDOMS AND THE GOVERNOR IN COUNCIL'S DECISION-MAKING

Inuit has disrupted the progression of "fairness", but the Charter may turn the flow in favour of increased accountability of Cabinet for any decision they make, even of a purely political nature, if it can be established that some aspect of the Charter's protections has been violated.

The issue has already received judicial consideration in Operation Dismantle Inc. v. The Government of Canada[89] (referred to as the Cruise case).

The Supreme Court of Canada has reserved judgment, nevertheless the decisions of both divisions of the Federal Court should be reviewed. The two most important sections of the Charter for determining its application to Cabinet decisions are s.32 and s.52.

Section 32(1) specifies that the Charter applies:

> "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

In interpreting s.32(1), one commentator has suggested that of the three sectors of government; the legislative; the executive; and the judicial; the legislative sector of government is most certainly subject to the Charter because it is explicitly dealt with, but the executive must also be subject to the Charter because "government" is used instead of the words "Parliament" or "legislature".[90]

Section 52(1) indicates that:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the

inconsistency, of no force or effect."

In examining the Cruise decisions, references to whether s.7 of the Charter was violated, as a result of the decision to allow the testing of the Cruise missile in Canada, are omitted; only the issue of whether the Charter can apply to decisions of Cabinet is discussed. It is difficult to ascertain a clear ratio decidendi from the appeal court's decision because all five judges gave such a variety of reasons for their decisions, but on the issue of the Charter's applicability to allow review of Cabinet decisions there appears to be enough agreement to confirm the trial division's ruling.

In the Cruise case the plaintiffs alleged that the Canadian government's agreement to permit the United States to test the cruise missile within the territorial limits of Canada was unconstitutional as a violation of the Charter's protections. The defendants brought a motion to strike out the statement of claim and dismiss the action on the grounds that it disclosed no reasonable cause of action, on the basis that the decision to permit the testing was one made by the government in its executive capacity based on policy and expediency and consequently was not subject to interference from the judiciary.[91]

Mr. Justice Cattanach of the Trial Division acknowledged that if the issue had arisen before the Charter, Parliament would have been supreme, but because of the Charter, the power to challenge could exist. The combination of s.52(1) and s.32(1)(a) erodes the basic principles of supremacy of Parliament to the extent that Parliament and the government of Canada cannot breach the rights and freedoms guaranteed in the Charter.[92]

Parliament is supreme and it could have excluded itself from the grasp of the Charter, but s.32(1)(a) specifically subjects Parliament and the government to the Charter.

> "In light of the plain meaning of the language of Section 32, expressed in clear and unequivocal terms, to ignore that meaning and ascribe to those words a different meaning to the effect the Charter should not apply to matters decided on the basis of policy is to abandon the role of a judge and assume the function of a legislator. No such exception is made. However a method is provided in Section 33 of the Charter which applies to legislation and would apply to executive action if within the legislation. That method was not adopted."[93]

He confirmed that "Government of Canada" can be interpreted as the Cabinet, for Cabinet acts in an executive way to implement policies and decisions of the

government of the day, therefore s.32(1)(a) makes the Charter applicable to the government if an executive decision is taken which breaches the rights and freedoms of the Charter.[94]

In the Federal Court of Appeal,[95] three of the five justices agreed that even if the decision to allow the testing was purely political and made by the government in the exercise of its royal prerogative,[96] the Charter still could apply to the decision if it violated a provision of the Charter. In that respect they agreed with Mr. Justice Cattanach of the Trial Division in holding that s.32 is such a clear provision that when it specifies that it applies to the "Parliament and government of Canada in respect of all matters within the authority of Parliament," even a decision by Cabinet such as the cruise missile decision, is subject to the Charter.[97]

One contrary opinion[98] suggested that the royal prerogative could only be limited by clear and express statutory provisions and since the Charter made no express provision for the royal prerogative, it could not be subject to the Charter. However, in his judgment he

failed to make reference to s.32 and it is suggested that the language in s.32 is as clear and express as one could hope for it to be.

In spite of the majority finding that the Charter could apply, for various reasons all five justices determined that the statement of claim did not contain sufficient allegations to raise a justiciable issue, therefore, the appeal was allowed. (The Trial Division had found that there was a justiciable issue in the statement of claim and dismissed the application to strike it out).

Nonetheless, the Cruise case is a momentous decision for it held a Cabinet decision to be subject to the Charter, even when the decision was assumed to have been made by Cabinet in a proper manner for the benefit of Canada, with no reason to question Cabinet's action on the basis of lack of jurisdiction or failure to meet a condition precedent. Moreover, it held that even royal prerogative powers in international relations and national security are subject to the Charter. This is significant, for prior to the Cruise, courts had been reluctant to review decisions of Cabinet made pursuant to the royal prerogative and had gone so far as to declare that it was not possible to do so.[99]

ENDNOTES

1 D.J. Mullan, "Developments in Administrative Law: The 1978-79 Term", (1980), 1 Supreme Court L.R. 1, at p. 2.

2 D.J. Mullan, "Fairness and Natural Justice", (1983), 4 C.R.R. 5 - 19.

3 Ibid.

4 S.A. deSmith, DeSmith's Judicial Review of Administrative Action, 4th ed. (London: Stevens & Sons Ltd., 1980), p. 71.

5 Mauger v. Minister of Employment and Immigration (1980), 36 N.R. 91 (F.C.C.A.).

6 deSmith, Judicial Review, p. 77.

7 Ibid., pp. 80-81.

8 P. Garant, "Fundamental Freedoms & Natural Justice (Section 7)", in Canadian Charter of Rights and Freedoms - Commentary, ed. W.S. Tarnopolsky & G.-A. Beaudoin (Toronto: Carswell Co. Ltd., 1982), p. 280.

9 Ibid., p. 281.

10 Ibid.

11 Mullan, "The 1978-79 Term", p. 3. The cases referred to are: Mitchell v. The Queen, [1976] 2 S.C.R. 570; Martineau v. Matsqui Institution Inmate Disciplinary Bd., [1978] 1 S.C.R. 118; Howarth v. National Parole Board, [1976] 1 S.C.R. 453.

12 [1979] 1 S.C.R. 311.

13 Mullan, "Fairness and Natural Justice", p. 5 - 20.

14 J.H. Grey, "The Duty to Act Fairly After Nicholson", (1980), 25 McGill L.J. 598, at p. 599.

15 Nicholson, [1979] 1 S.C.R. 311, at p. 328.

16 Ibid., p. 325.

17 Mullan, "The 1978-79 Term", pp. 12-13.

18 Ibid., p. 13.

19 R.A. Macdonald & M. Paskell-Mede, "Annual Survey of Canadian Law: Administrative Law", (1981), 13 Ottawa L.R. 671, at p. 747.

20 T.E. Quinn Truck Lines Ltd. (1981), 129 D.L.R. (3d) 513 (S.C.C.). The court stated that the content of the duty to act fairly varies for different exercises of the same statutory power. The Minister's duty to act fairly may involve no procedural obligations at all or it could involve more procedures than normally required of the board. The importance of it is that it preserves flexibility and sensitivity for particular fact situations.

21 Grey, "The Duty to Act", p. 602.

22 Ibid., p. 600.

23 R.A. Macdonald, "The Limits of Procedural Fairness: Executive Action by the Governor in Council?", (1981-82), 46 Sask. L.R. 187.

24 Mullan, "The 1978-79 Term", p. 12.

25 [1980] 1 S.C.R. 602.

26 Macdonald, "The Limits", p. 187.

27 Martineau, p. 629.

28 Ibid., pp. 628-629.

29 Ibid., p. 630.

30 Macdonald & Paskell, "Annual Survey", p. 748.

31 Martineau, p. 631.

32 Macdonald & Paskell, "Annual Survey", p. 749.

33 (1983), 42 O.R. (2d) 62 (H.C.J. Div. Ct.), at p. 63. See also Re Fredericks and Board of Commissioners of Police of Town of Essex (1983), 43 O.R. (2d) 776.

34 (1983), 41 O.R. (2d) 552 (C.A.), at p. 554. See also Kane v. Board of Governors of University of British Columbia, [1980] 1 S.C.R. 1105, at pp. 1115-1116.

35 (1982), 46 N.R. 1 (F.C.C.A.), at p. 16.

36 J.H. Grey, "Can Fairness be Effective", (1982), 27 McGill L.J. 360.

37 Ibid.

38 Martineau, p. 628.

39 [1980] 2 S.C.R. 735.

40 Grey, "Can Fairness be Effective", p. 361.

41 Macdonald, "The Limits", p. 189.

42 Inuit, p. 738.

43 Ibid., p. 745.

44 Ibid., p. 748.

45 Ibid., p. 750.

46 Landreville v. The Queen (No. 3) (1980) 111 D.L.R. (3d) 36 (F.C.T.D.). If the Cabinet declines jurisdiction by failing to decide the application, then they are subject to review.

47 Inuit, p. 753.

48 Ibid., p. 755.

49 Ibid., p. 757.

50 [1972], 1 W.L.R. 1373, at p. 1378.

51 Inuit, p. 759.

52 D.J. Mullan, "Developments in Administrative Law: The 1980-81 Term", (1982), 3 Supreme Court L.R. 1, at p. 18.

53 Ibid., p. 19.

54 Macdonald, "The Limits", p. 195.

55 Mullan, "The 1980-81 Term", p. 19.

56 Ibid., p. 20.

57 Grey, "Can Fairness be Effective", p. 363.

58 Ibid., p. 361.

59 Mullan, "The 1980-81 Term", p. 23.

60 [1982] 2 F.C. 3 (T.D.).

61 Mullan, "Fairness and Natural Justice", p. 5-21.

62 (1983), 149 D.L.R. (3d) 748 (F.C.T.D.).

63 J. Evans, J. Polinka and P. Cavalluzzo, "Taking the Cabinet to Court", paper presented at the meeting of the Canadian Bar Association - Administrative Law Section, Toronto, Ontario, December 7, 1981, at p. 3.

64 Ibid., p. 7.

65 Ibid., p. 9.

66 (1976), 12 O.R. (2d) 164 (H.C.J. Div. Ct.), at p. 176.

67 (1983), 45 O.R. (2d) (H.C.J. Div. Ct.).

68 R.S.C. 1970, c.10 (2nd Supp.).

69 Re Williams, p. 294.

70 Ibid.

71 J. Barker, "Applicant's Onus in Order in Council Challenge Creates Catch-22 Situation, Says Lawyer", Ontario Lawyers Weekly, 9 March 1984, p. 1.

72 Evans, "Taking Cabinet to Court", p. 10.

73 Martineau, p. 628.

74 (1978), 90 D.L.R. (3d) 388 (B.C.S.C.), at p. 394.

75 Evans, "Taking Cabinet to Court", p. 9.

76 [1981] 2 W.W.R. 636 (B.C.S.C.), at p. 646.

77 Evans, "Taking Cabinet to Court", p. 9.

R. v. Beaver, [1982] 4 W.W.R. 344 (Alta Q.B.), at p. 351, the court held that if no rights of a specific individual are affected, then it indicates a legislative function.

78 (1983), 44 O.R. (2d) 376 (H.C.J.).

79 A "res" is everything that forms an object of rights (actions of all kinds).

80 A "lis" is a controversey, a dispute or law suit. The specific wording "akin to a lis" was taken from Inuit, p. 758.

81 Township of South-West Oxford, p. 378.

82 [1982] 3 W.W.R. 546 (B.C.S.C.).

83 Martineau, p. 628.

84 Acro Pace, p. 550.

85 Ibid., p. 551.

86 Re Campbell and Stephenson (1984), 44 O.R. (2d) 656 (H.C.J. Div. Ct.).

87 Evans, "Taking Cabinet to Court", p. 3.

88 Ibid., p. 4.

89 (1984), 49 N.R. 363 (F.C.C.A.).

90 D. Gibson, "Distinguishing the Governors from the Governed: The Meaning of "Government" Under Section 32(1) of the Charter", (1983), 13 Man. L.J. 505, at p. 511.

91 Operation Dismantle Inc. v. The Queen, [1983] 1 F.C. 429 (T.D.), at p. 432.

92 Ibid., p. 434.

93 Ibid.

94 Ibid., p. 435.

95 (1984), 49 N.R. 363 (F.C.C.A.)

96 Royal Prerogative is what has been left to the King from the time when he governed as an absolute monarch. Statutes now govern most areas where he once did, but some areas are still left to him. For example, the areas of prerogative still existing today include the supreme command of the armed forces, national defence, and conduct of external affairs. (taken from Marceau J's judgment, p. 392).

97 See Pratte J. at p. 367, Ryan J. at p. 370 and LeDain J. at p. 375.

98 See Marceau J., p. 396.

99 Re Doctors Hospital, p. 175.

CHAPTER 4

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Introduction

Now that it has been established that the Charter can apply to Cabinet decisions and could provide an avenue for review for parties who have had a favourable CRTC decision overturned by Cabinet, it is relevant to determine in which other respects the Charter will impact on CRTC operations.

The Charter's impact could be most prominent in relation to the CRTC's Canadian content regulations; to various procedures employed by the CRTC in conducting its hearings; and to the use of legally binding Cabinet directives, as a means of directing CRTC policy making.

The primary sections of the Charter that will be relied upon to question the validity of these aspects of the CRTC's operations are sections 1, 2(b), 7 and 15. Sections 1, 2(b) and 15 will be discussed in relation to the content controls, then the components of s.7 will be reviewed before proceeding with an analysis of some of the procedures which could fall victim to the protection of s.7.

1. SECTION 1

Section 1 of the Canadian Charter of Rights and Freedoms

"guarantees the rights and freedoms set

> out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The drafters of the Charter recognized that the courts would not always be able to absolutely safeguard the Charter protections, consequently the limitation clause (s.1) was inserted to prevent the judiciary from creating techniques to elude absolute interpretation of the protections.[1]

Section 1 means that the Charter's rights may not be overridden at will, but in some circumstances the rights and freedoms give way to legitimate government purposes.[2] It requires that the judiciary balance and compare competing valid concerns, the guaranteed right in the Charter versus the alleged societal need for regulation.[3]

To determine the application of s.1 to the Charter's rights and freedoms it is possible to classify the rights and freedoms into different categories based on the burden imposed on the applicant.

"Single burden rights" are ones which contain no internal limitation (e.g. unreasonable) in their substantive definitions. The applicant need only demonstrate that the government action is a <u>prima facie</u> limitation of the particular rights.[4] The reason for there being no limiting language on these rights is that

they are to be allotted absolute protection, unless the government is able to satisfy the requirements of s.1. For example, the political freedoms in s.2; conscience, thought, belief, religion, opinion and expression are to be protected to a greater degree because without strict protections these rights, which are considered essential to a democratic society, could be easily violated.[5] For this reason, one need only show a prima facie infringement before the burden shifts to the government pursuant to s.1, to justify the restriction.

"Double burden rights" contain internal limitations within their definitions requiring the applicant to establish that there has been a prima facie infringement on the right by government action, and that the government has acted in an unreasonable or arbitrary manner.[6]

When a section of the Charter itself describes a right or freedom in a way that requires balancing (e.g. s.12 is not a right precluding all punishment, just "cruel and unusual" punishment; or s.8 not all searches, just "unreasonable" ones) then the primary test for determining the constitutionality of the asserted justification is from the substantive section itself, s.1 is not the balancing test to use.[7]

Where the reasonableness of the action is an essential element of the right's substantive internal definition then the applicant must not only show that the state did something to violate the right, but also that it was done in an unreasonable way.[8] Once these two elements are shown the onus shifts to the government to justify the action under s.1.

Once the onus has shifted to the government to justify the infringement it is incumbent on them to show that:

1) the infringement is a reasonable one;

2) it is prescribed by law; and

3) it is demonstrably justified in a free and democratic society.[9]

1) Reasonable

The notion of reasonableness embraces several different concepts.

First of all, the limit is reasonable if it is a means proportionate to the end at which a law is directed.[10] The limit must be related to a legitimate government objective with the limitation being tailored to meet the purpose. It must be reasonable by reference to an objective standard.[11]

Secondly, the limit is only reasonable if it is

necessary and if it is the least restrictive means for achieving the government purpose.[12] Therefore, even if the limitation achieves its public purpose, if it is excessive in its application, then it is not reasonable. Where a right is primary to our society (e.g. freedom of expression) an especially high standard of justification will be imposed, meaning that if a less restrictive means is available to accomplish the government objective, then the limitation is not justified.[13]

Lastly, the limit must not be motivated by bad faith or instituted for arbitrary or capricious reasons.[14]

(b) Prescribed by Law

A limitation is "prescribed by law" when it has been imposed by statute, regulation or common law and is of legal force.[15]

"Law" has been interpreted to include regulations adopted by semi-public agencies (eg. Barreau du Quebec) that are subject to government approval because they are considered to be delegated legislation.[16] Furthermore, a rule of the Law Society of Alberta, adopted pursuant to statute has been held to be "law".[17]

"Prescribed by law" would also include

decisions by statutory tribunals and boards in the exercise of their statutory authority because "law" depends on the source of the power and not the manner in which it was exercised. When a board exercises power, it does so in accordance with delegated authority traceable back to the legislation, therefore, as long as the board has not exceeded its jurisdiction, its decisions are law.[18]

However, according to Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (referred to as Ontario Censors), a limitation which has been left to administrative discretion cannot be "prescribed by law".[19]

The court was asked to determine whether censorship (prior restraint) provisions of the Theatres Act and the standards of the Ontario Board of Censors limited the freedom of expression as guaranteed in s.2(b). In following the steps set out in s.1, the court found a prima facie violation of s.2(b) and then by looking to other provinces and countries, they confirmed that prior censorship was "demonstrably justified in a free and democratic society", as a means of preventing socially offensive films from being shown publicly.

But, were the limits on the right "prescribed

by law"? There was a legislative grant to the Board to perform duties and the classification scheme itself did not offend the Charter, but the limits on the duty were left to the discretion of the administrative tribunal. The limits were vague and undefined in that they simply gave a right to censor any film without criteria or definition.[20]

Since the limits were not ascertainable, understandable or articulated with precision and since they could be determined by the whim of an official, they were not limitations "prescribed by law". The film-maker had some indication of how the film should be judged based on guidelines issued by the Board but these were held to be of no legal force. However, the court did suggest that the criteria could be rendered operable by passing regulations pursuant to the legislative authority or by enacting amendments which imposed reasonable limits and standards.[21]

As the limits were not "prescribed by law" there was no need to determine if they were reasonable limits. In the end, the Board's actions were found to infringe upon the s.2(b) protection.

In upholding the decision, the Ontario Court of Appeal agreed that the statutory section set no limits on

the ability of the Board to censor, they allowed for complete denial or prohibition of the freedom of expression.[22]

In Re Luscher and Deputy Minister, Revenue Canada Customs and Excise,[23] a magazine was confiscated at the border because it was "immoral and indecent" as set out in the Customs Tariff. The issue was whether the Tariff imposed limitations on the freedom of expression in s.2(b).

Were the limits "prescribed by law"? Guidelines issued to the customs officers to help them interpret "immoral and indecent", were held not to be "law", but since the Tariff and Schedule to the Customs Act were limits by parliamentary authority, they were "law".

The situation differed from Ontario Censors in that there were no limits set out in the Theatres Act; there was just a right to "censor any film" without criteria or definition, therefore the pamphlets prepared to assist the Board were not "law".

In effect, the court in Luscher agreed with the suggestion in Ontario Censors that if the limits on a board are imposed by legislation then they are acceptable, as long as they also meet the reasonableness

standard in s.1.

Was the limitation in Luscher "reasonable"? The court determined that the phrase "immoral and indecent", even though not clearly defined anywhere in the legislation, was able to be interpreted by a court to meet the standards of the community, therefore, it was a "reasonable" limitation.

(c) Demonstrably Justified in a Free and Democratic Society

"Demonstrably justified" refers to the burden being on the government to justify the infringement of the right, supported by substantial or compelling governmental or societal interests.[24] For example, in Re Federal Republic of Germany and Rauca, even though extradition was considered to be a prima facie violation of the s.6 right to remain in Canada, it was held to be a reasonable limitation when viewing the standards in Canadian society and comparing it to other countries with democratic rights similar to those in Canada.[25]

"In a free and democratic society" refers to the use of pre-Charter Canadian legislation and decisions; legislation and decisions from other democracies; and standards taken from international conventions concerning similar matters.[26]

Similar restrictions in other free and democratic societies will be highly persuasive, but even if there are similar restrictions elsewhere, the limitation must still stand on its own by showing it is demonstrably justified on the basis of necessity.[27] As the court in Re Southam Inc. and The Queen asserted, there is a positive obligation on those seeking to uphold the limit to establish to the court's satisfaction the purpose of the limiting law by reference to its economic, social and political background, and if helpful, by reference to comparable jurisdictions of other acknowledged free and democratic societies. The evidence of other countries is helpful but ultimately the court must look to our society to determine whether the limitation is reasonable.[28]

2. THE CANADIAN CONTENT QUOTAS

> "Canadian content quotas are pivotal in comprehending the regulation of broadcasting by the CRTC... The public purpose with which broadcasting has been cloaked is manifested on the regulatory side by Canadian content requirements. Without these quotas, most of the ancillary preoccupations of the CRTC... would assume much less importance than at present... In short, the major "raison d'etre" of the CRTC is Canadian content."[29]

The obvious importance of the Canadian content regulations to the CRTC's function demands that they be

considered in light of the Charter to test their constitutional validity. To do so, a brief overview of the current regulations and the proposals to amend the quota system will be undertaken before examining whether the quota system infringes the Charter.

(a) Background

Traditionally, one of the most frequent complaints about Canadian broadcasting pertained to the low level of Canadian content in programming.[30] In an attempt to remedy this deficiency, quotas on the amount of Canadian content to be broadcast, were first imposed on broadcasters on July 1, 1960.[31]

One of the broadcasting policy's major aims was to foster Canadian nationalism, largely in response to the defensive temperament instilled by Canada's proximity to the U.S. The threat to Canadian culture emanating from information crossing the border, made it important to give Canadian resources and talent priority to ensure Canadian control over broadcasting, to allow a means of strengthening Canadian unity and developing a Canadian way of life. The focus has been not so much to exclude foreign programming as to facilitate production and increase quality of Canadian programming.[32]

The content regulations went through numerous

changes in their stages of development, but immediately prior to the recent proposals to amend them, they consisted of the following factors.

1) During each 12 month period commencing October 1st, Non-Canadian programmes could not exceed 40% of the broadcasting day and between 6 p.m. and midnight, the CBC could not broadcast more than 40% Non-Canadian programmes and private broadcasters could not broadcast more than 50%.[33]

2) A programme produced outside Canada which was lip-synchronized into English or French in Canada, received one-quarter time credit.[34]

3) The CRTC could deem any programme to be Canadian.[35] For example, anything produced by a licensee has been considered Canadian without needing certification[36] and anything which has the support of the Canadian Film Development Corporation has been accepted by the CRTC.[37]

In the application form for CRTC programme recognition, a Canadian programme is defined as one where the performing, artistic, technical and financial resources are predominantly or entirely Canadian. There is also a category of programme which is not distinctively Canadian, but merits recognition because substantial employment and revenue has gone to Canadians or it has some special merits as determined by the CRTC.[38]

4) A May 16, 1972 CRTC announcement listed guidelines for joint ventures and

co-productions with other countries.[39] Essentially, it set out the percentage of co-production costs that had to be spent on "Canadian participation" (e.g. performers, technicians etc.) for the programme to qualify as Canadian content.

There were a myriad of problems associated with the regulations, including:

i) not enough Canadian content being aired in the prime time viewing hours;[40]

ii) the CRTC not adequately enforcing the regulations;[41]

iii) the regulations had not resulted in broadcasters generally taking strides to adequately meet and exceed the quotas;[42]

iv) the regulations only required quantity and not quality, therefore the programmes had difficulty competing with more popular U.S. shows partly because they were badly underrepresented in quality drama and variety entertainment programming.[43]

Generally, the problems with the quota can be attributed to the CRTC attempting to force its content policies onto broadcasters when it has not been economically beneficial for broadcasters to strictly abide by the quotas. It has been more profitable for broadcasters to show popular U.S. entertainment programming in prime time, than to show Canadian content, therefore, to promote their own economic interests, broadcasters have devised various methods to avoid strict

compliance with the content requirements.

As a result of all the problems associated with the quota system, the CRTC undertook a review of the regulations and proposals for amending them were issued on January 31, 1983. The proposals have directly affected the Canadian content required during the peak hours (7:30 to 10:30 p.m.); the length of the reporting period; and the status of lip-synchronized programmes; but two of the most important proposals included a new definition for Canadian programmes and the increased use of conditions of licence to promote "voluntary" compliance with the regulations.[44]

The new definition for Canadian programmes (effective April 1, 1984[45]) sets requirements for matters such as the number of Canadians required in key positions of production (e.g. director, producer); the amount required to be spent on Canadian personnel and costs; and the amount of Canadian participation required for joint venture productions with other countries to be considered Canadian content.[46]

The other important proposal, to expand on the use of conditions of licence beginning with the next licence renewal, is intended to stimulate improvements in Canadian production. Broadcasters will be expected to

submit realistic and achievable statements respecting Canadian content production and they may also be expected to expend a minimum percentage of revenues on production of Canadian programming in the future.[47]

Even though the CRTC has spent five years reviewing the content regulations and putting forth proposals to improve the effectiveness of the regulations, limitations beyond their control may effectively impede the implementation of the policy. As one author has noted,

> "There will be pressure to deregulate by the Courts. Whether or not the CRTC's Canadian content and program content regulation and condition-making powers will be diminished is not questioned. Timing and specific cases will determine how and when this will happen. No doubt the CRTC's fulsome powers to "supervise and regulate" will erode."[48]

The accuracy of this prediction should be assessed by reviewing the section of the Charter most likely to challenge the content regulations, s.2(b). It specifies that:

> "Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

It should be noted that "everyone" has been found to include corporations,[49] as logically it should

if "other media" is to have any practical meaning in the section.

The majority of the cases under s.2(b) so far, have involved the freedom of the press to either attend at or report on court proceedings, versus the right of the accused to a "fair and public hearing" under s.11(d) of the Charter. Generally, the cases have indicated that restraint of a newspaper's freedom of expression can be justified in circumstances where the non-disclosure is necessary to guarantee the s.11(d) right.[50] It is evident that both rights have been recognized by the courts and given due protection when warranted by the facts, but by no means has s.2(b) been given uncompromising pre-eminence.

Cases interpreting "freedom of expression" to this point, have found that it has a wider and larger connotation than "freedom of the press".[51] It protects all forms of expression, oral, written, pictorial, sculpture, music, dance or film.[52] Moreover, the freedom extends to those who wish to express someone else's ideas or show their film and also extends to the listener and to the viewer.[53]

An interesting interpretation for s.2(b), which contradicts in part that given above, arose in the

majority decision in Re Koumoudouros and Municipality of Metropolitan Toronto.[54] The issue concerned whether or not a city by-law could require striptease dancers not to remove their "G-strings". To answer this, the court questioned whether burlesque dancing was a form of artistic expression guaranteed by s.2(b).

> "The close linking in s.2(b) of the Charter of the freedom of thought, belief, opinion and expression suggests rather that freedom of expression refers to the freedom of communication of ideas, and opinions among the citizens of Canada, so that, in broad terms, those citizens may continue to live in the free and democratic society referred to in s.1 of the Charter. Furthermore, s.2(b) goes on after providing for "freedom of expression" with the following words "including freedom of the press and other media of communication", these words reinforce the view that the thrust of s.2(b) is in the political and government domain, a domain in which the freedom of thought, belief, opinion and expression are inseparable from a free and democratic society."[55]

Since the evidence submitted showed a connection between nude dancing and increased sales, the right being claimed was not a right to freedom of artistic expression, but the right to expose performers' pubic areas for the purpose of stimulating liquor sales. Therefore, the by-law was not an infringement of s.2(b).[56]

Mr. Justice Osler expressed a different opinion

on the meaning of "freedom of expression" by submitting that the majority interpretation was too narrow.

> "While the word burlesque may be thought by most to describe a form of expression that is perhaps more vulgar than most of the artistic endeavours ... it is, nevertheless, a form of expression, and to insist on a quality or quantity of clothing for persons expressing themselves in that form does, in my view, limit a freedom of expression."[57]

But, he dismissed the application because he found that under s.1, the limitation was a reasonable one demonstrably justified in a free and democratic society.

The obscenity provision of the Criminal Code was tested in R. v. Red Hot Video Ltd.[58], when the accused alleged that it infringed on its s.2(b) right. "Obscene" was described as

> "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence..."[59]

Clearly, there was a prima facie infringement of "freedom of expression" in that the accused was limited as to the video tapes it chose to distribute,[60] but the court found that censorship laws prohibiting undue exploitation of sex are reasonable provided there is sufficient clarity in the law to allow one to ascertain what is or is not obscene.[61] The law here was

deemed to be clear enough.

(b) Do the Content Regulations Violate the Charter?

The steps to follow in analyzing whether the Canadian content regulations violate the Charter are:

(i) is there a "prima facie" infringement of s.2(b)?;

(ii) is it an infringement which can be "demonstrably justified in a free and democratic society"?;

(iii) is the limit "prescribed by law"?; and

(iv) is it a "reasonable limit"?

(i) "Prima facie" infringement

It is submitted that it could be established with little difficulty that there is a "prima facie" infringement of the "freedom of thought, belief, opinion and expression, including ... other media of communication", in that broadcasters are instructed how much of certain types of programming they are allowed to broadcast and at some point in their schedules they must keep a programme off the air which they would prefer to show (and possibly one that the audience would prefer to view) in place of one which meets government requirements.

(ii) "Demonstrably justified in a free and democratic society"

62

Case law suggests to examine other

jurisdictions recognized as free and democratic to ascertain if the limit is consistent with approaches used in those jurisdictions.

Australia

The regulating authority in Australia has imposed a similar system of content regulation on Australian broadcasters for many of the same reasons a system was set up here, namely, there was a paucity of domestic programming, especially in prime viewing times as a result of American programmes being more popular to viewers and more lucrative for broadcasters. The quota system is much more complex and restrictive though than in Canada. It almost totally limits broadcasters' freedom in scheduling during certain time periods if the quota is to be attained.[63] By comparison, the Canadian quotas are less severe.

United States

The First Amendment of the U.S. specifies that "Congress shall make no laws abridging freedom of speech or freedom of the press." The Charter goes much farther by providing for "freedom of expression ... and other media of communication," therefore, one should not simply reflect the American case law onto the Charter, however, the U.S. experience may be viewed in comparison.[64]

In the U.S., the press has been given the

widest possible freedom while the broadcaster has been restricted by Federal Communications Commission's (FCC) rules and regulations. Freedom to determine content has been somewhat restricted for broadcasters because of the limited access and a need to allocate frequency, consequently those with licences have been expected to serve the community and not their own interests.[65]

For example, in Red Lion Broadcasting Co. v. F.C.C.,[66] the U.S. Supreme Court upheld the FCC's Fairness Doctrine which required stations to provide both sides the opportunity to be heard on controversial issues. This was found not to abridge the freedom of speech. The paramount right was that of the viewers and not that of the broadcasters.[67]

Thus, some interference with content has been justified in the past because of the technology involved and the necessity to control it. However, the current trend in the U.S. is to deregulate FCC control over programming. Two bills, intended to prohibit government control over programming in broadcasting and cable telecommunications,[68] have passed the Senate but are still before the House Committees. If the bills become legislation, control over programming content will be effectively curtailed. While the trend in the U.S. has

been to deregulate, in Canada it seems to have been aimed more at improving the process of regulation than getting rid of it. Although, perhaps inevitably, the push to deregulate has begun in Canada. For example, a 1981 Report of the Economic Council of Canada has suggested that it would be appropriate for the government to consider selectively deregulating aspects of telecommunications.[69]

Since the U.S. has found it suitable to deregulate government control over programming content, a Canadian court might be more inclined to find that the s.2(b) infringement cannot be justified in a free and democratic society. The trend to deregulate, if nothing else, may inspire a court to question the legitimacy of the infringement, whereas if the trend had not existed, a court could easily have found that control over content was permissible in our societies.

(iii) Is the Limit "prescribed by law"?

It is necessary to determine whether it has been completely left to the discretion of an official to fix the limits on the content or whether the limits are ascertainable by viewing the guidelines and regulations.

The aspect of the regulation included in the Television Broadcasting Regulations[70] enacted pursuant to

the Broadcasting Act, is clearly a formal statutory enactment which attains the status of "law". However, would the same conclusion necessarily follow for other elements of the limitations, such as when CRTC officials deem a programme to be Canadian? According to Ontario Censors they may have no legal force for it has been left to the whim of an official to recommend content status.[70a]

The proposals to amend the quota merit the same consideration. If the proposals take on the form of regulation (e.g. amendments to the Television Broadcasting Regulations), then they clearly would be "law". However, where an aspect of the quota, as with the new definition for a Canadian programme, is merely a policy statement or announcement of the CRTC, then there is some question as to its legal force.[70b]

It may be arguable that the policy statement of the CRTC could be "law", in part because of the format used to develop the policy. The CRTC has traditionally used policy statements in place of formal regulations and the CRTC itself considers the policy statements to be of a binding nature. The policies have been adopted after public hearings have considered the issues and concerns of the public. Consequently, the Commission has been in

a position to try and tailor its policies to meet public concerns.

In addition, s.3(d) of the Broadcasting Act requires that the CRTC ensure that

> "programming provided by the Canadian broadcasting system ... be varied and comprehensive ... and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources."

If the policy statement is viewed as providing interpretive assistance to broadcasters to assist them in determining accreditation for Canadian content purposes and the policy statement is an extension of the statutory mandate in s.3(d), then it might be considered to be more than just a guideline with no parliamentary authority. If the source of the power is considered instead of the manner in which it was exercised, then the policy statement defining a Canadian programme might be considered to be "law".

But, because of Ontario Censors and Luscher holding that guidelines are not "law", the CRTC may have difficulty establishing that its public hearing procedure and traditional use of policy statements in place of regulations takes the Canadian programme definition beyond the scope of a guideline. Nevertheless, even if

it cannot be considered "law", the new definition could easily be made law by putting it into the form of a regulation. Once that has been done, the limit would be "prescribed by law" and the reasonableness of the limitation would have to be considered.

(iv) "Reasonable limit"

To determine whether the limit is "reasonable" two different approaches must be discussed:

1) is the limit reasonable, in that it is proportionate to the end at which the law is directed?; [71] and

2) the limit is only reasonable if it is necessary and if it is the least restrictive means for achieving the government purpose. [72]

1) The ascertainment of whether the end is justified by the means, requires a balancing between the guaranteed right and the government objective. The burden is shifted to the government to prove that the content regulations are a reasonable limit to meet the objective of promoting and protecting the Canadian production industry; defending and fostering Canadian nationalism; and providing opportunities for Canadian talent.

One way of viewing the issue is to question

whether the quotas abridge freedom of expression or merely allow access to the airwaves for programmes which never would have been seen (or possibly never produced) if it had not been for the protection of the CRTC's regulations.[73]

If no content regulations existed broadcasters likely would be scheduling as much U.S. entertainment programming as possible, resulting in reduced production expenses, increased advertising revenues and increased profits. It would be difficult for broadcasters to claim that their freedom of expression is being violated merely because potential profits are being restricted by the content regulations. As already indicated, the court in Re Koumoudouras specifically rejected the notion of claiming a violation of a right as a means to attain greater profits.

If the regulation restricted public affairs or news programming, effectively stifling public exposure to conflicting, varied and possibly anti-government points of view, then unquestionably freedom of expression would be stifled. But, must the same conclusion follow because a broadcaster has been forced to show a percentage of Canadian programming?

The "reasonable" balancing of the government

objective with the infringement of the guaranteed right, which a court must go through, is by far the most subjective aspect of the analysis. As a result, any prediction is difficult; however, it is suggested that it would not be unreasonable for a court to find that the regulations are a reasonable infringement on the freedom of expression in order to meet the stated government objectives.

2) Is the infringement necessary and the least restrictive means for achieving the government purpose? If viable alternatives could meet the objectives of promoting the Canadian production industry and fostering Canadian nationalism, then perhaps the quotas are not a "reasonable limit".

It is suggested that other methods might be effective in earmarking funds for production of Canadian programmes. Tax breaks could be used as an incentive to produce Canadian programmes, or conversely, the imposition of a tax on a percentage of revenues could establish a fund, in much the same way as cable operators are currently being taxed to support a fund earmarked for Canadian production.[74]

The licensing and renewal process could be used to impose conditions and expectations directed at each

broadcaster to stimulate production of Canadian programming. The proposals intend to use this tactic in conjunction with content quotas.

The Supreme Court of Canada held recently that it was acceptable for the CRTC to impose a condition of licence, stipulating that a broadcaster should present a specified amount of original Canadian drama over a term of the licence.[75] The court noted that s.17 of the Broadcasting Act authorized the CRTC to impose conditions and the one in question was a reasonable condition to further the objects of the CRTC under s.15 and to implement the broadcasting policy enunciated in s.3.

Admittedly, there was no Charter argument alleging infringement of the freedom of expression, and a different result could ensue if s.2(b) is argued in a future case; however, the court has given legitimacy to the practice of imposing licence conditions to meet broadcasting objectives.

Another method (and possibly the most effective one) could be to directly subsidize production facilities and talent, as long as their efforts are aimed at producing quality Canadian programming, instead of financing methods to enforce content regulations.

These submissions do not disclose an exhaustive

list of alternatives, but they do suggest that a court legitimately could find other means available to achieve the desired results. Therefore, the content quotas may not be the least restrictive means available to the government to satisfy their objectives and as such could be found to infringe the s.2(b) right.

Before a final determination can be made on the issue of whether the content regulations infringe on s.2(b), two other factors ought to be considered.

First, the court in Ontario Censors commented that:

> "One thing is sure, however, our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable." [76]

The concern is that this attitude is not compatible with the "broad and liberal interpretation" approach our courts made such frequent reference to in the earliest Charter decisions. It is suggested that the scope of the Charter would be restricted unnecessarily by such a conservative approach.

Secondly, Mr. Justice Eberle's comment in Re Koumoudouras that the freedom of expression in s.2(b) relates to the political and governmental domain rather than "artistic expression", could unnecessarily restrict

the scope of s.2(b).

Since programming on TV could be classified as artistic expression, or at least the broadcasters' wish to be unregulated would be based on their desire to broadcast any programmes they wish, if the statement above gains prominence, the Charter's application may be severely restricted. Even though the comment is not binding, as it was made in obiter, it exemplifies the conservative approach referred to earlier and forces one to be cautious before boldly asserting that the Canadian content regulations do in fact infringe upon the s.2(b) right.

In conclusion, the grounds capable of challenging the content regulations would be that the limitation on s.2(b) is not reasonable or that the quota is not the least restrictive means of attaining the government objective. As indicated previously, the latter provides the more fertile ground for challenge.

(c) Section 15

It has been proposed that s.15 of the Charter (when it comes into force on April 17, 1985) could be used to challenge the ability of the CRTC to use its condition-making powers, which, in turn, would directly affect its ability to impose different content

requirements onto broadcasters.

Section 15 stipulates that:

> "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The obvious hurdle to overcome is the use of the words "every individual" in describing the scope of the group protected by the provision. Other sections of the Charter use "everyone" which has been interpreted to include corporations.[78] One commentator suggested that it was the intention of the politicians to give "everyone" a broad meaning to include all entities, as opposed to using "every individual" to limit application to natural persons and to exclude corporations.[79]

It is suggested that the wording in s.15 is intentional, to exclude corporations from the rights guaranteed in s.15. Also, s.15 sets out examples of the type of discrimination it is intended to combat. Clearly, the categories listed have no application to corporate entities, thus furthering the conclusion that the s.15 equality rights were not intended to extend to corporations, but were designed exclusively to protect the rights of people.

Can the predicament be solved by having the individual shareholders of the corporation bring the action alleging unequal treatment by the CRTC? It is submitted, that the cornerstone of corporate law is the acknowledgement that the corportion is an entity separate and distinct from the people owning it, and has been conferred rights and duties of its own, which are separate to rights of the shareholders. As such, conditions of licence would be imposed on the corporation and only the corporation would have the right to bring an action to challenge them.

But, one aspect of the CRTC's licensing process could arguably lead to a conclusion that the individual has a right to bring an application claiming unequal treatment under s.15. Often, it is the individual making an application to the Commission and all their personal information is divulged, before a licence is issued to the individual on behalf of a corporation to be incorporated at a later date. In this respect, one could argue that the individual maintains his personal right to initiate actions.

In spite of this thought though, it is unlikely that s.15 will be found to apply to corporate entities and it is unlikely that a court would grant a broadcaster

relief under s.15.

3. SECTION 7

Section 7 of the Charter specifies that,

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

As alluded to earlier, Charter cases have included corporations in "everyone", therefore, it is clear that corporations and natural persons are able to enjoy the protections of s.7.[80]

The aspects of s.7 that require analysis for present purposes are the terms "security of the person" and the "principles of fundamental justice".

(a) Security of the Person

Section 7 is in the Legal Rights portion of the Charter, but that does not automatically mean that "security of the person" only applies to criminal and penal processes. The rights in s.7 arise for "any invasions of personal security (however defined) regardless of whether the process causing it is criminal or civil, judicial or administrative."[81]

At the international level, "security of the person" has been narrowly interpreted to limit state interference with "liberty" which has been held to mean

freedom from arrest and detention, the absence of physical restraint.[82]

The problem with imposing this interpretation onto the Charter is that in the European Convention on Human Rights[83], the terms "liberty" and "security of the person" appear with the concept of detention of persons, therefore, naturally they have been interpreted to mean freedom from physical restraint. In the Charter there is no connection to detention in the wording, therefore, the phrase should be allowed to take on a new meaning in Canada.[84]

How then should "security of the person" be interpreted? Should it include security with respect to property, livelihood, family, a person's autonomous being?[85]

(i) Property

The exclusion of a reference to property rights in s.7 was not accidental, it was specifically proposed and specifically rejected at the drafting stage.[86] Nevertheless, one case has held the Charter to implicitly protect the right to property as part of "security of the person."

In The Queen v. Fisherman's Wharf Ltd.,[87] "security of the person" was interpreted to include a

right to enjoy ownership of property which extended to provide for security of the person, but there was no elaboration of what property might be within the phrase. The facts showed that a lien on business property of a vendor who owed taxes, only extended to the property owned by the vendor, the lien did not extend to the property leased to the vendor or used by him under a conditional sales contract. As the court noted,

> "The charter is silent in specific reference to property rights. In that circumstance it can only be assumed, in my view, that the expression "right to... security of the person" as used in s.7 must be construed as comprising the right to enjoyment of the ownership of property which extends to "security of the person" and that in consequence the further words of s.7, viz., "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" must extend to the right not to be deprived of property rights which tend to extend to the security of the person."[88]

From this context, it could be assumed that "property" can relate to that necessary to earn an income and livelihood. As a result "state action which deprives a person of all (or a substantial portion) of his or her capacity to produce an income could be seen as invading the "security of the person."[89]

Some doubt has been expressed that the case was correctly decided mainly because the decision was

affirmed on appeal on non-Charter grounds with the appeal court suggesting that security of property was not protected by the Charter, for it was not expressly included.[90]

Moreover, since then a few cases have refused to accept the notion of a right to property being included within s.7.[91] For example, in Becker v. The Queen in Right of Alberta, the court stated that enjoyment of property was not protected by the Charter because there is no reference to property in the Charter and if enjoyment of property was meant to be included, it would have been included.[92]

The issue has not been conclusively determined yet and cogent arguments support both sides of the issue.

It is reasonable to assert that since enjoyment of property was specifically left out of the Charter by the drafters and some decisions have followed denying its application, it is questionable whether the courts will create a right to property.[93]

On the other hand, Fisherman's Wharf may have been a step in the right direction by interpreting s.7 to protect economic rights for it is also within reason to expect that "security of the person" would include some conditions of living beyond liberty. Consequently,

conditions necessary for life such as food and shelter could be included. Moreover, a loss of income affecting one's ability to meet bodily needs and economic interests such as property and jobs should be protected by s.7.[94]

If enjoyment of property had been included, then clearly it would have protected economic interests, nonetheless "security of the person", on its own, connotes interests central to personal integrity, as such, economic interests could be indispensable to the dignity and integrity of the person.[95]

It might be possible to extend s.7 to the point of providing an affirmative constitutional duty to supply basic public services necessary to stay alive (public welfare programmes including food, shelter, clothing and medical) so that if there is a cut back in these programmes, one could challenge them on the basis that the security of the person had been infringed by the deprivation of the service.[96]

It is difficult to discern a clear ratio from the Cruise case, but the court did comment on "security of the person." The respondents had suggested that the phrase guaranteed every person the protection against any danger and to be provided with the necessaries for their well-being.[97]

Mr. Justice Pratte felt this was too broad and suggested that "security of the person" should be narrowly interpreted because of its use in conjunction with "liberty". He likened it to the interpretation of the European Convention on Human Rights, where it refers to freedom from arrest and detention and protection from arbitrary interference with that liberty.[98]

Mr. Justice Marceau suggested that s.7 never goes beyond protecting the life and freedom of movement of citizens against arbitrary action and despotism by people in power; against actions by public authorities which would directly conflict with the general sense of fair play, justice and equity.[99]

Since it is evident that the Cruise[100] case contradicts the view of some that "security of the person" also has an economic welfare connotation,[101] it is uncertain how it ultimately will be interpreted, but it is suggested that a broader definition to include economic interests would be consistent with the intention of the Charter to protect and enhance those rights already existing in Canada. The right to economic interests may not have been entrenched in black letter law in the past, but as citizens of a democratic society, these rights have been implicitly bestowed upon us.

The interpretation of "security of the person" is important, for if it does extend to cover economic interests or privacy or reputation or a host of other personal securities, the protections generated by s.7 will have far reaching consequences.

(b) Fundamental Justice

There is considerable disagreement over the meaning of "fundamental justice". The discord concerns whether it refers to procedural fairness only or whether it also includes the concept of substantive fairness. Therefore, the discussion will examine arguments for both procedural and substantive fairness and then conclude by setting out the consequences of "fundamental justice" if it is ultimately determined to include procedural fairness only.

Instead of using "natural justice" in s.7 so the meaning would be clear, the drafters inserted the words "fundamental justice." From the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,[102] it is patent that "fundamental justice" was intended to cover the same thing as "procedural due process", meaning a requirement for fair procedure. In their opinion, it did not cover the

concept of "substantive due process" which would impose substantive requirements as to the policy of the law in question.[103]

The government intended "fundamental justice" to mean "natural justice" or procedural fairness and to preclude judicial review of the substance of the policy.[104] The drafters wanted "fundamental justice" to be interpreted by the courts in the same way as "fairness" has been developing.[105] They believed that "fundamental justice" and "natural justice" referred to procedural guarantees only.[106]

One of the reasons for the government's belief that "fundamental justice" precluded the judicial review of the substance of policy was that the phrase is used in s.2(e) of the Bill of Rights[107] and has been held to mean that government decisions must be in accordance with the procedural standards of the rules of natural justice.[108]

However, government intentions aside, from a literal reading of s.7 there is no reason to believe that "fundamental justice" must only be synonymous with natural justice, it could encompass whether the substantive concepts of justice have been complied with.[109]

Also, it is no wonder that Bill of Rights cases held "fundamental justice" to relate to procedural fairness only because the phrase is used alongside "fair hearing" in s.2(e). But, s.7 of the Charter makes no reference to "fair hearing", therefore it could be argued that s.7 goes beyond procedural protections to allow parties to claim that the substance of the law must also be just.[110]

Whether s.7 will allow courts to review the substantive law and declare unjust laws unconstitutional is of critical importance[111] for it will have a substantial impact on the decision-making function of federal administrative tribunals such as the CRTC. If "fundamental justice" is confined to meaning nothing more than "procedural fairness" or "natural justice" then one of the only differences brought about by the Charter will be the ability of the courts to strike down primary legislation which does not offer appropriate procedural standards.[112]

As the review of the cases that follow indicates, there is divided opinion over the issue of whether "fundamental justice" is substantive as well as procedural.

(i) Procedural

Re Potma and the Queen[113] determined whether an accused who had not been afforded an opportunity to conduct her own analysis of the breathalyzer test ampoules used in measuring the alcohol-blood content, had been denied her right to a fair trial.

The court held that the inability to test for herself did not infringe on her right to a fair trial in accordance with fundamental justice. The concepts of "fundamental justice" and "fair hearing" (in s.7 & 11(d) respectively) were the same as the concepts under the Bill of Rights and the Common Law.[114]

"Fundamental justice" like "natural justice" or "fair play" is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure."[115]

The case clearly held "fundamental justice" to be procedural only, but since the issue before the court was strictly procedural, the issue of whether s.7 could be substantive as well never arose for the court's consideration.[116]

The cases of Re United States of America and Smith[117] and Re United States of America and Yue[118] both dealt with extradition hearings where the fugitives alleged that the admission of affidavit evidence, without

providing them an opportunity to cross-examine the deponents, violated their rights to "fundamental justice" under s.7. Both courts referred to Re Potma and adopted the principles enunciated respecting "fundamental justice". As a result, it was interpreted in the procedural sense only. The denial of an opportunity to cross-examine did not offend their s.7 protections, as it was determined to be a reasonable limit demonstrably justified in a free and democratic society.

Re Jamieson and the Queen[119] was more overt in rejecting the substantive argument for s.7. The requirement that a person charged with an indictable offence attend to have fingerprints taken was found not to infringe the Charter protection. In particular, "fundamental justice" was held to be synonymous with "natural justice".

The court also commented that,

> "It appears to be established now that the effect of this section is procedural and not substantive in that it may be used to impugn the form of an infringement of the guaranteed rights but not the substance thereof."[120]

The court in Re Mason arrived at a similar conclusion in a situation involving the suspension of the applicant's release on mandatory supervision when they held that it was "undoubted that s.7 was intended to

guarantee procedural due process (i.e. natural justice) and not substantive due process."[121]

Numerous other cases have reached the identical conclusion that "fundamental justice" is procedural only.[122]

(ii) Substantive

It seems that there have been almost as many cases where the courts have looked at the substance of the legislation when asked to consider s.7.

The case most referred to has been Reference Re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288,[123] where the British Columbia Court of Appeal questioned whether s.94(2) of the Motor Vehicle Act was consistent with the Charter, in that it provided that a person who drove a motor vehicle while prohibited or under suspension, commits an absolute liability offence with a mandatory seven days jail term. The section was found to be inconsistent with "the principles of fundamental justice" and consequently of no force or effect.

The court stated that the Charter added a new role for the courts by giving them the jurisdiction not only to question the vires of the legislation and whether procedural safeguards existed, but to go further and

consider the content of the legislation as well.[124]

Considering that a person could be imprisoned for seven days without having been afforded an opportunity to prove that their action was due to an honest mistake or done without guilty intent, led the court to maintain that "fundamental justice" was not restricted to procedure only, but extended to substantive law. In construing s.7, the courts have the obligation to question the content of the legislation.[125]

As s.94(2) was considered to go beyond the reasonable limits envisaged by s.1 of the Charter, it was held to be inconsistent with the Charter.[126]

Section 94 of the Motor Vehicle Act had already been considered in the earlier decision of R. v. Campagna, where the court also declared it to be of no force or effect because,

> "If it can be said that absolute liability offences in themselves "violated fundamental principles of penal liability", one which causes a minimum term of imprisonment must be said to be in violation of principles of fundamental justice"[127]

They commented that the wording of s.7 invited one to consider the principles of fundamental justice were "as valid guides to the legality of legislation as to the legality of procedure."[128]

The section was held inoperative for the court was unable to conclude that it was a reasonable limit (s.1) because it went too far by imposing harsh measures to attempt to remedy a serious social problem, the safety of the public on the road.[129]

In R. v. Stevens, the Ontario Court of Appeal (the same court, but not the same justices as in Re Potma) dealt with s.146(1) of the Criminal Code, which provided that intercourse with a female under fourteen, was an absolute liability offence, no intention needed to be proven. The court concluded that

> "Assuming, without in any way deciding the question, that s.7 of the Charter permits judicial review of the substantive content of legislation ... s.7 does not have the effect of invalidating s.146(1) ..."[130]

Consequently, it was acceptable for Parliament to create crimes such as in s.146(1) to protect young girls; it was demonstrably justified when viewed in comparison with legislation in other countries.

The case is important for the court assumed that s.7 could be substantive but did not decide the issue. Considering that the same court had decided Re Potma two weeks earlier, it was a curious manner for deciding Stevens. Perhaps the court was attempting to gently retreat from its comments in Re Potma linking

"fundamental justice" with "natural justice" or "fair play" when it stated that

> "The principles of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust."[131]

In Stevens, the court was faced with a substantive issue, Was it unfair or unjust for the section to impose absolute liability on an accused?; whereas in Re Potma the issue concerned the accused wanting to personally test breathalyzer ampoules, which clearly was a procedural matter related to the conduct of a fair trial.

The difference in opinion may have been simply as a result of a difference in situations before the court. It is suggested that in both cases, the reading of s.7 was consistent with the facts before each court. In Stevens, the court may have been conscious of allowing fairness to evolve and develop in response to society's changing needs.

In R. v. [redacted]eyallon,[132] a mandatory five year prohibition against possessing a firearm in addition to a sentence for a violent crime, was held to be contrary to s.7. The accused was an Indian hunter and trapper who

depended on a firearm to live.

"Justice" was interpreted to mean fair play; not only in relation to procedure, but also in respect of the disposition or penalty in a case. In the particular circumstances, the mandatory prohibition order was patently unfair. The court stated that "fairness must extend to disposition,"[133] and decided not to prohibit the use of firearms, as required by the Criminal Code.

In R. v. Hayden,[134] the court asserted that it agreed with the position adopted in R. v. Rolbin[135] and R. v. Campagna that the Charter vested in the court the power to review the substance of legislation.[136]

The court in R. v. Watch[137] held that the imposition of liability on the owner of a vehicle for failing to remain at the scene of an accident (he was not in the vehicle at the time) was contrary to s.7 of the Charter.

> "It is contrary to the principles of fundamental justice ...for a person to be convicted and punished for an offence although there was no blame-worthy condition of mind or malevolent act attributable to him and it is my view that the evolution of the philosophy of justice has come to the point where such a law is inconsistent with the principles of "fundamental justice..."[138]

The court in R. v. Gustavson questioned the propriety of a judge having the discretion to impose an

indeterminate sentence under the dangerous offender legislation. They rejected the argument that unequal treatment of persons in the same class (dangerous offenders) was discriminatory and fundamentally unjust, but they did state that "the right to equality before the law is a fundamental principle of justice."[139]

To even question whether there is equal treatment in legislation is a substantive evaluation of the legislative scheme, it is not a procedural issue, therefore, in an indirect manner the court considered the substance of the legislation even though the accused had not actually argued that indeterminate sentences were fundamentally unjust (a substantive argument).[140]

R. v. Red Hot Video Ltd. ruled on the obscenity provisions of the Criminal Code. Part of the provision stipulated that ignorance of the nature or presence of the matter was not a defence to the charge. The court held that to remove the requirement of knowledge eliminated the necessity to prove mens rea, which was not reasonable, therefore, it infringed upon the rights in s.7.[141]

Without specifically stating so, the court looked at the substance of the provision and found it to be untenable in our society.

Finally in the Cruise case, Mr. Justice Marceau was the only judge to decide on the substantive or procedural dilemma by commenting that it may be admitted that s.7 goes to the content of decisions (as in s.94(2) Reference), but it never goes higher than protecting the life and freedom of movement of the citizens against arbitrary action and despotism by people in power and against actions by public authorities which directly conflict with the sense of fair play, justice and equality.[142]

This long list of cases simply reveals the uncertainty of the courts over how s.7 should be treated. One commentator has suggested that the legislation in most of these cases gave rise to substantive review because a burden had been imposed on a particular class of person to facilitate government action. For example, under s.94(2) of the Motor Vehicle Act, those who drove while their licences were suspended, whether they knew of the suspension or not, were guilty of an absolute liability offence, resulting in the Crown having an easier time of obtaining convictions.[143]

Therefore, it can be seen that if legislation places a burden on a class of people for a general benefit to government, then a challenge under s.7

naturally gives rise to substantive review. However, the problem with this test for substantive review is that it is difficult to distinguish between procedural and substantive review. The test is not very helpful because most procedural shortcuts could be considered to burden some class of affected people, consequently to conclude that a challenge is substantive and not procedural depends on how the legislative provisions are described.[144]

As a result of this difficulty in establishing a test to classify the two types of review, it provides a valid argument on its own that s.7 should be available to review substantive matters as well as procedural injustices.[145]

Since courts have been reviewing the substance of legislative provisions, it is relevant to question whether it is so objectionable to permit judges to undertake substantive review under s.7. Substantive review could enhance prevailing democratic values simply by forcing legislators to more carefully consider whom the legislation is directed at to avoid burdening a particular class.[146]

Furthermore, substantive review would be useful at controlling the abuse of discretion by boards,

tribunals and other government agencies.[147] It suggests that courts would be deciding whether a decision is fair in the sense that they would have reached the same decision on the facts. The obvious problem with this is that if courts begin usurping the power of tribunals by cloaking their considered opinions in the place of tribunals by finding that substantive fairness did not take place, then it is an inappropriate use of substantive fairness. Consequently, an interpretation of s.7 including the substantive element should be done carefully, otherwise the independence of the agency is threatened.[148]

The basic dilemma for the courts to resolve is whether in interpreting s.7 to permit substantive review, judges will need to determine whether they are adequately suited to resolve individual and state interests, instead of leaving the decisions to be made by the people's elected representatives.[149]

The other dilemma which needs to be addressed is whether each application for judicial review because of substantive or procedural unfairness will become, in essence, an appeal for a trial de novo. If every unfair situation results in a re-hearing of the matter before the tribunal, then obvious difficulties arise,

consequently, a resolution of the issue must consider when a re-hearing is appropriate and when a court should make a final determination.

Conclusion

It is evident from the case law that courts have reviewed the substance of legislation, especially when the provisions have been grossly unfair, such as in absolute liability offences, where an owner of a vehicle could be charged with failing to remain at an accident when he was not even present at the incident leading to the charge (R. v. Watch).

It appears to be justified in circumstances such as the above to allow substantive review, but the Supreme court must ultimately decide the issue.

In assessing the role of "fundamental justice" it is important to consider the legislative history, from which it is clear that the intent of s.7 is to be procedural only. It is very possible that the Supreme Court will look to the legislative history because,

150

> "Based on recent cases it appears that the courts are departing from the English tradition of construing a statute based solely on what it says. Canadian courts no longer ignore extrinsic evidence of the political, legislative history of a statutory provision. Charter litigation will stretch the court's tolerance on the question of the admissibility of extrinsic evidence. So

> much useful material is contained in the transcripts of the proceedings of the Joint Committee and in Hansard that there will be constant pressure to adduce such evidence as an aid to construction not merely for the purpose of painting the social and institutional backdrop."[151]

In spite of politicians and drafters intending s.7 to only include procedural fairness, the court could still accept s.7 on its face value and interpret it to include review of substantive, as well as procedural content,[152] and since cases have been splitting on the interpretation already, substantive fundamental justice is a possibility,[153] and one which would be well received.

(c) Procedural Fundamental Justice

If it is presumed that s.7 ensures procedural fairness only and not substantive fairness, then there are still some noteworthy consequences arising from s. 7 having entrenched procedural fairness into the constitution.[154]

After Nicholson and Martineau, citizens were left with sufficient protections against the infringement of their procedural fundamental rights, but there still were some areas which were not adequately protected (e.g. legislative functions as in Inuit). The advantage of s.7 is that it provides a constitutional status for the

procedural guarantees arising from common law.[155]

Whether procedures are provided by legislation or by regulations, if a party is dissatisfied with them, s.7 may be invoked to challenge the adequacy of them.[156] "An individual is always free to allege that the procedural framework is incomplete or insufficient."[157]

Of course, even where the legislation or regulations are silent, a person can allege that the administrative directives do not conform with natural justice.[158]

It has been suggested that there are four main consequences from procedural fundamental justice.[159]

First of all, as already indicated, fair procedure is now a constitutional right and any legislation which deprives the life, liberty or security of a person without fair procedures is inoperative.

Secondly, fair procedure exists regardless of the function the administrative body performs, therefore, it would no longer be necessary to find a particular function for the person to be entitled to procedural fairness. Everyone is entitled to procedural fairness if an agency has deprived them of life, liberty or security of the person.

But the procedures to satisfy s.7 will depend

on the function performed by the agency - if it is a judicial function, then higher standards of fairness would be required than for administrative or legislative functions. The classification of functions, therefore, is not obsolete, it is merely no longer the threshold determinant, it becomes relevant at a later stage of the analysis.

Thirdly, a decision violating fundamental justice is unconstitutional and void ab initio, it is not just voidable.

Lastly, a privative clause in the legislation precluding judicial review would be struck down if s.7 is violated.

Even though s.7 guarantees fair procedures, the actual procedures required for any given fact situation, will still vary; an "in person" hearing would not always be required,[160] nor would a right to counsel.[161]

4. EXAMPLES OF THE CHARTER'S IMPACT

Since s.7 has been thoroughly explained, it is appropriate to consider its effect on the Governor in Council's direction-making power, on the Canadian content quotas and on some of the CRTC's procedures.

(a) Directives

The Minister of Communications has proposed to

implement the use of legally binding directives to direct policy to the CRTC.[162] There is no question that a legally binding directive of the Governor in Council is a function of "government" within s.32 of the Charter, therefore, if a direction violates the rights or freedoms of the Charter [e.g. s.7 of s.2(b)] then it would be ultra vires. The question to consider is whether or not the current use or an increased use of directives will offend s.7.

To illustrate the effect of s.7 on the four directives currently operating, the cross-ownership directive will be used as an example.

First of all, will "security of the person" include economic interests such as the ability to earn a livelihood? If one is denied the ability to own a broadcasting operation, one's economic interests are affected, consequently "security of the person" would be violated.

Secondly, if there is an infringement of s.7, then has it been done in accordance with the principles of "fundamental justice"? If "fundamental justice" is held to be substantive, as well as procedural, then a court would be able to look at the merits of the directive to determine if it is fair in relation to the

societal evil of cross-ownership between newspapers and broadcasters which could restrict diverse news from reaching people within a locality.

Even if no substantive review is allowed, it is still open to question whether the Governor in Council has proceeded fairly when deciding to implement a directive. Has there been a public hearing or an opportunity for public input into the process?

If directives are the result of government input only, then they could be challenged on the basis of not providing adequate procedural protections. But, as with the cross-ownership directive, if the directive resulted from a royal commission's study where public interest would have been accounted for, it would be reasonable to assert that the procedures were adequate.

If there is an increased use of directives, then procedural fairness should ensure that Cabinet will not be permitted to issue directives without providing some procedures to allow public input (as suggested in Chapter 2) and perhaps a formal method for proceeding from the point of proposing a directive to the point of implementing it. In this way the directive power would be restricted by the Charter, because Cabinet would not have a free rein to do whatever they wished, some notion

of a fair proceeding would be expected of them.

Does the cross-ownership directive offend the s.2(b) freedom of "expression, including the freedom of the press and other media of communication"?

There is a *prima facie* infringement because it restricts who has the right to express themselves, but under s.1 is it a "reasonable limit demonstrably justified in a free and democratic society"? It likely is since it is geared to protecting democratic rights by not allowing a domination of the media in a vicinity by the same group of people, to ensure that there are diverse sources of news which hopefully will act as a means of allowing truth to surface.

The limit is reasonable because it is not absolute, it permits overlapping ownership if they are the only media in the area or if a beneficial service has been provided.

The cross-ownership directive has been challenged very recently in the courts and has been upheld as a valid directive. The court held that Cabinet can direct the CRTC "for any valid reason of public policy" under the *Broadcasting Act*, as long as it does not exceed its jurisdiction. As well, the directive was held not to infringe on the freedom of expression in

s.2(b) of the Charter.[163]

It appears that the courts will uphold Cabinet's wholesome powers to direct the CRTC if there is a legitimate government objective and it is not an excessive means to achieve the desired result.

(b) Canadian Content

If "security of the person" also includes economic interests and the ability to earn an income, then it is possible to argue that the content quotas infringe on the s.7 right.

If "fundamental justice" allows for substantive review, then a court could review the substance of the regulations to determine their fairness in relation to the benefit to society (protection of culture etc.). If it is procedural only, then has the economic interest been denied in accordance with fair procedures? As a result of the extensive public hearing process providing persons with an opportunity to make submissions before the Commission enacts regulations, it is likely that the procedures employed would be considered to be fair.

(c) CRTC Procedures

Some of the CRTC procedures open to challenge under the Charter have been set out. Some procedures have been considered in greater detail, while others are

simply listed in order to identify them as potential problem areas.

(i) Cross-examination

The right to cross-examine is permitted at telecommunications hearings, but not at broadcast hearings. An informal hearing process is employed in broadcasting matters - applicants and intervenors make oral representations followed by questioning by the Commission. Evidence is not sworn and there is no cross-examination.[164]

The informal procedure allows parties and the Commission to exchange ideas freely and for the public to participate without concern for the complex rules of procedure and without being intimidated by the prospect of cross-examination. Generally, it enhances the public hearing process, in that the Commission feels that it is too time consuming and would change the atmosphere of the hearing, largely by discouraging public participation.[165] Since the public hearing is essentially an information gathering process instead of an adversarial one, forbidding cross-examination is consistent with the general purpose of the hearing.

No cross-examination is acceptable for some matters, (e.g. policy discussions) but where there are

serious interventions or a real contest between parties, it may not be appropriate for the Commission to do all the questioning, because it deprives parties of the opportunity to adequately present their case or test their adversary's credibility.[166]

At common law, there is no generally recognized right to cross-examine and courts have maintained this by often refusing to dictate procedure to tribunals and by refusing to impose the requirement of cross-examination onto tribunals.[167]

With respect to the CRTC, in Lipkovits v. CRTC, the court sustained the CRTC's rule of not permitting cross-examination of witnesses at broadcasting hearings.[168] By doing so, the court gave the CRTC latitude to devise appropriate procedures for the hearings to conduct the task being performed. It also shows that courts will not always interfere if the tribunal has carefully devised their procedures to suit the purpose at hand.[169]

To challenge the CRTC rule of forbidding cross-examination under s.7 of the Charter, one would first have to establish that "security of the person" could include economic interests for s.7 to apply to the hearing procedure. If there is no infringement of a

Charter provision, then no remedy ensues.

If "security of the person" has been infringed because of a denial to cross-examine, then has it been done in accordance with "fundamental justice", were the procedures fair for the type of hearing?

Re United States of America and Smith considered this question with respect to extradition hearings. In particular, they considered whether s.7 conferred a right on the applicant to cross-examine the deponents of affidavits tendered by the respondent in support of an application for extradition, before the affidavits could be admitted into evidence.[170]

The court held that the importance of cross-examination varies with the nature of the proceedings. Since the purpose of an extradition hearing is not to determine the guilt or innocence of a fugitive, a refusal to allow cross-examination is not contrary to the principles of fundamental justice.[171] They continued, that even if the s.7 right had been limited, there would not be a violation of s.1 for it is a reasonable restriction that is permissible in free and democratic societies.[172]

A different result occurred in Millar v. The Queen,[173] where a section of the Criminal Code

prohibiting examination and cross-examination of an accused at a show cause hearing, was held to violate s.7, as being in contravention of the audi alteram partem rule.

Consequently, courts have gone both ways on the issue, but for the reasons listed earlier for the CRTC imposing the restriction on cross-examination and because of the reasoning in the extradition cases, it is likely that the CRTC procedure would not violate s.7.

Would a different result ensue if s.15 of the Charter was argued? Since the equality provision in s.15 likely does not apply to corporations, there would be no challenge available on the basis of equality because of the difference in procedure respecting cross-examination between broadcasting and telecommunications hearings.

(ii) Collegial Decision-Making

Collegial decision-making involves the process of allowing commissioners who were not at the hearing to participate in making the final decision. Where an Executive Committee decision is required (most decisions in broadcasting are made by full-time members) the decision is made in three stages. Initially, the hearing panel (usually a mixture of full and part-time members) meets immediately after the hearing and tries to arrive

at a preliminary decision on the matter. Then there is consultation on the applications by all members of the Commission. Members who were not at the hearing are able to hear and comment on the applications and make recommendations as to disposition. The final decision is made at a subsequent meeting of the Executive Committee.

Since the quorum for a hearing panel is only two members (one of whom is full-time), in most cases a majority of the Executive Committee actually making the decision would not have been at the hearing. Moreover, because of the time pressures on the Executive Committee, it is too much to expect that all the full-time members who were not at the hearing would read all the transcripts and other file material before participating in the decisions. As a result, considerable reliance must be placed on the members who were at the hearing.[174]

In telecommunications matters, collegial decision-making has been abandoned in all cases where sworn evidence and cross-examination take place, therefore, essentially only the panel sitting at the hearing makes the decision.[175] But, in broadcasting matters the legislative intention is for part-time members to contribute to the deliberations, yet it is the full-time members who ultimately make most of the

decisions.[176] The whole commission makes decisions respecting regulations and revocation of licences.[177]

The purpose of collegial decision-making is to ensure consistency in policy in all cases. Consistent policy is desirable, but it is not essential that the Executive Committee make decisions in a collegial manner. Policies could be discussed in advance of or after hearings and then applied to the cases heard by each panel. Each panel would then be aware of the common approach to policy, yet be able to apply it to suit the facts of each case. It is not necessary that the Executive Committee as a whole decide each case to maintain consistent policy.

Decisions on pure policy issues could still be made in a collegial manner, but for individual fact situations where the merits of each case should receive some independent consideration, a collegial approach is inappropriate. It is for this reason that the collegial approach was abandoned in telecommunications matters.[178]

The complaint with collegial decision-making is that it is fundamentally unjust to allow decisions to be made by Commissioners who were not at the hearing, did not hear the evidence and did not have an opportunity to evaluate the credibility of the witnesses. In effect, it

is unjust to allow them to make decisions by relying on second-hand information, either written materials which they may or may not have time to read or the information of the members who participated at the hearing.[179]

Prior to the Charter's enactment in the case of Re CTV TV Network Ltd. and CRTC, the Supreme Court of Canada sustained a decision of the CRTC where all members of a hearing panel were not present throughout the hearing. The hearing panel consisted of six members, four full-time and two part-time. On three occasions during the hearing members were absent for part of the proceeding, yet all the members of the panel subsequently participated in the consultation process and the full-time members participated in the decision-making.[180]

The court concluded that the Executive Committee decision was not defeasible because s.17(1) of the Broadcasting Act expressly authorized all full-time members to make decisions, whether or not they heard the representations at the public hearing. As long as there was a quorum at the hearing, there was no express or implied authority to limit members' participation in the decision-making, especially when the parties consented to the hearing proceeding with the reduced panel on those three occasions. Since the statute authorized the manner

of decision-making used by the CRTC, the court upheld the decision.

One Charter case has reviewed a similar matter. In Re Mason,[181] the third member of a National Parole Board post-suspension hearing was not present at the hearing, nor did he hear any evidence or submissions of the prisoner, yet he cast the deciding vote after reviewing the written material. The Parole Regulations set out an acceptable regulatory framework for conducting hearings and specifically permitted the deciding vote to be cast by an absent member. Nevertheless, the matter was remitted to the Board for a properly constituted hearing, because the court considered it fundamentally unjust that the liberty of someone was decided by a person not even present at the hearing. As a result the s.7 right to fair proceedings was upheld.

It is suggested that the CRTC's collegial decision-making procedure would suffer the same fate because the concept is patently unreasonable, even if it is done for the purpose of maintaining consistency in policy in decision-making and even if it is authorized by statute. Section 7 can effectively challenge statutory procedures (as it did successfully in Re Mason), consequently provided that one is able to

establish a violation of "security of the person", then s.7 could find collegial decision-making to be unreasonable.

(iii) Confidentiality of Documents

Several matters can be examined under the heading of confidentiality of documents.

First of all, the confidentiality of the material used to brief the Commission in broadcasting and telecommunications matters has been objected to for some time. The material includes staff documents which summarize applications and discuss regulations and policies affecting the application before the Commission. The material has been kept confidential simply because it does not add evidence to the process, therefore, it has been within the Commission's discretion to disclose it.

However, often these staff briefs are relied upon by the Commissioners as their primary source of information, therefore, the accuracy of the information and objectivity of the brief is crucial. The importance of disclosing these briefs is two-fold: if materials contain errors or omissions, they may be corrected; and there would be no surprises for the applicant at the hearing. Consequently, the material should be disclosed to the parties as a means of enhancing the quality of

participation in the regulatory process.[182]

Secondly, Rule 20 of the CRTC Rules of Procedure (Broadcasting) allows the CRTC to declare certain documents of the applicant (e.g. financial statements) to be confidential, if it is in the public interest to do so. The objection to this confidentiality is that it denies the opportunity to examine and fully answer the applicant's case.[183]

Presumably, the reason for allowing some of the applicant's documents to remain confidential is to obtain accurate disclosure from applicants and to protect their competitive interests.

A similar situation exists for telecommunications because s.331 of the Railway Act allows for the applicant's financial information to remain confidential. Recently the CRTC has been disclosing this information if requested to by a party and if the applicant is not able to show sufficient harm resulting from the disclosure of the information. However, the procedure still exists and is open to challenge if disclosure is refused.[184]

(iv) Evidence Under Oath

At broadcasting hearings the evidence is not given under oath. The reason for doing so is to create a

more informal information gathering proceeding rather than to conduct an adversarial hearing. However, if the rules of natural justice are invoked into other aspects of the hearing process, such as by introducing cross-examination, then a provision for sworn testimony might also follow.

Conclusion

These examples of proceedings which could be affected by the Charter are by no means exhaustive, but they have indicated how expansive the reach of the Charter could be. Consequently, the CRTC's procedures should be tested against the Charter's provisions and those falling below acceptable standards ought to be revised by the CRTC to avoid the unnecessary disruption to their busy hearing schedule that procedural challenges would cause.

There is reason for the CRTC to be concerned about potential challenges; however, because they have attempted to carry out their mandate by utilizing a public hearing process, not only to deal with licensing applications but to consider policy objectives, they have exhibited an interest for public opinion. They have exerted considerable effort to make themselves accessible to the public and to consider the public interest at all

stages of proceedings. The procedures devised are adaptable to and promote a public hearing format. By doing so, the CRTC has created a reasonable decision-making process.

There may be some prima facie violations of the guaranteed rights and freedoms in the Charter (e.g. no cross-examination may be an infringement of "security of the person"), but because the limitations have been imposed to maintain an informal and open format for the public to participate in, the limitations likely are reasonable ones which can be justified in a free and democratic society. Reasonable methods have been installed to carry out a reasonable purpose, consequently many of the procedures would be defensible on that basis alone.

ENDNOTES

1 T.J. Christian, "The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms", (1982), U.B.C. Law Rev. Charter Ed. 105, at p. 106.

2 P.A. Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter, (1983), 13 Man. L.J. 669.

3 Ibid., p. 675.

4 N. Finkelstein, "Section 1: The Standard for Assessing Restrictive Government Actions and the Charter's Code of Procedure and Evidence", (1983), 9 Queen's L.J. 143, at p. 147.

5 Bender, "Justifications", p. 680. He suggests that other single burden rights include ss. 3, 5, 6, 10, 11(c)(f)(g)(h)(i), 13, 14.

6 Finkelstein, "Section 1", p. 147.

7 Bender, "Justifications", p. 678. See also M. Manning, Rights, Freedoms and Analysis of the Constitution Act, 1982 (Toronto: Edmond-Montgomery Ltd., 1983), pp. 141-142. Note: Many sections contain their own balancing criteria: ss. 2(d), 4, 7, 8, 9, 11(a)(d)(e), 12, 15.

8 Finkelstein, "Section 1", p. 152.

9 Que. Assoc. of Protestant School Bds. v. Attorney General for Quebec (No. 2) (1982), 140 D.L.R. (3d) (Que. S.C.); aff'd June 9, 1983 (Que. C.A.).

10 Ibid.

11 Finkelstein, "Section 1", p. 157.

12 M.D. Lepofsky, "Section 2(b) of the Charter and Media Coverage of Criminal Court Proceedings", (1983), 34 C.R. (3d) 63, at p. 65.

13 Finkelstein, "Section 1", p. 163.

14 Ibid.

15 Christian, "Limitation of Liberty", p. 111.

16 Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec (1982), 142 D.L.R. (3d) 512 (Que S.C.).

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20 Ibid.

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25 (1983), 145 D.L.R. (3d) 638; 41 O.R. (2d) 225 (C.A.).

26 Christian, "Limitation of Liberty", p. 121. See also Re United States of America and Smith (1984), 44 O.R. (2d) 705 (C.A.), at p. 721.

27 Finkelstein, "Section 1", p. 156.

28 (1983), 41 O.R. (2d) 113 (C.A.), at p. 124.

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30 P.S. Grant, "The Regulation of Program Content in Canadian Television: An Introduction", (1968), 11 Can. Pub. Admin. 322, at p. 323.

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32 W.I. Romanow, The Canadian Content Regulations in Canadian Broadcasting, Ph.D. dissertation, Wayne

State University, 1974, pp. 26-27.

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43 Babe, Canadian Television, p. 147.

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47 CRTC Notice: 83-18.

48 J. Grafstein, "Impact of the New Charter of Rights on Broadcasting", Paper presented at proceedings sponsored by the Canadian Bar Association on the Impact of the New Canadian Charter of Rights and Freedoms on Publishing, Broadcasting and Advertising, June 4, 1982, at p. 17.

49 Re Balderstone and the Queen (1982), 2 C.C.C. (3d) 37 (Man. Q.B.), and Southam Inc. v. Dir. of Investigation and Research, Combines Investigation Branch, [1982] 4 W.W.R. 673 (Q.B.), at p. 682.

50 See: Re Global Communications and Attorney General of Canada (1983), 42 O.R. (2d) 113 (H.C.J.); In Re Edmonton Journal and Attorney General for Alberta (1983), 4 C.C.C. (3d) 59 (Alta. Q.B.).

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62 See Ontario Censors and other cases listed in the discussion of s.1.

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67 C. Beckton, "Freedom of Expression s.2(b)", in The Canadian Charter of Rights and Freedoms-Commentary, ed. W.S. Tarnopolsky & G.-A. Beaudoin (Toronto: Carswell Co. Ltd., 1982), p. 93.

68 The Broadcasting Deregulation Act of 1983 and The Cable Telecommunications Act of 1983.

69 J. Meisel, "Of Babies and Bathwater, Or, What Goes Down the Deregulatory Drain", (1982), 3 C.R.R. 5-27.

70 C.R.C., c. 381, s.8.

70a See the discussion of "prescribed by law" on pages 186-190.

70b See notes 44 and 46 for the proposals to amend the content quota and for the new definition of Canadian programming.

71 Quebec Assoc. of Protestant School Bds. (1982), 140 D.L.R. (3d) 33 (Que S.C.); aff'd June 9, 1983 (C.A.).

72 See: Lepofsky, "Section 2(b)", p. 65, and Finkelstein, "Section 1", p. 163.

73 Beckton, "Freedom of Expression", p. 94.

74 "Industry Criticizes New Federal Tax Scheme", Winnipeg Free Press, 4 May 1983, p. 21.

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78 Supra, footnote 49.

79 T. J. Christian, "Section 7 of the Canadian Charter

of Rights and Freedoms: Constraints on State Action", in Charter of Rights - Update 1983 (Legal Education Society of Alberta, 1983), p. 248.

80 Ibid., p. 250. See supra, footnote 49.

81 J.D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter", (1983), 13 Man. L.J. 455, at p. 473.

82 Christian, "Section 7", p. 277.

83 Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 U.N.T.S. 222. Part of Article 5 reads:
"(1) Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction...
(b) the lawful arrest..."

84 Christian, "Section 7", p. 278.

85 Whyte, "Fundamental Justice", p. 473. Note: It has been suggested that reputation is included (see Christian, p. 281) and privacy (see Whyte, p. 474.). Professor Christian suggests that "liberty" may be construed in a very broad sense by judges because of the liberal interpretation it has received in the U.S. "Liberty" has been interpreted to include: privacy; freedom to contract; the right to take up any livelihood; reputation; personal appearance (eg. hair style); the right to travel and live and work where one wishes to; and to use of public facilities. Generally, it has been a right which allows people to choose their public or private mode of life.
In many respects "liberty" has been interpreted to include the same notions as one might expect "security of the person" to take on.
See: T. J. Christian, "Section 7 of the Charter of Rights and Freedoms: Constraints on State Action", in Administrative Law - An Update (Legal Education Society of Alberta, March 31, 1984), pp. 16-26.

86 G.J. Brandt, "Canadian Charter of Rights and

Freedoms", (1983), 61 Can. Bar Rev. 398, at p. 403.

87 (1982), 135 D.L.R. (3d) 307 (N.B. Q.B.); aff'd on other grounds 144 D.L.R. (3d) 21 (N.B.C.A.).

88 135 D.L.R. (3d) 307, at p. 315.

89 Whyte, "Fundamental Justice", p. 474.

90 Christian, "Section 7", p. 279. See page 214 of the appeal decision.

91 Christian, "Section 7", p. 280.

92 (1983), 45 A.R. 36 (C.A.), at p. 41.

93 Christian, "Section 7", p. 281.

94 Whyte, "Fundamental Justice", p. 474.

95 Ibid., p. 475.

96 P.A. Bender, "Commentary", (1983), 13 Man. L.J. 489, at p. 491.

97 Operation Dismantle Inc. v. Government of Canada (1984), 49 N.R. 363 (F.C.C.A.), at p. 368.

98 Ibid.

99 Ibid., p. 386.

100 See: W.S. Tarnopolsky & G.-A. Beaudoin, ed. The Canadian Charter of Rights and Freedoms - Commentary (Toronto: Carswell Co. Ltd., 1982), p. 264; M. Manning, Rights, Freedoms and the Courts, p. 250 and Whyte, "Fundamental Freedoms", pp. 473-475.

101 A.J. Roman, "Operation Dismantle: An Acute Case of Obiter Dicta", Ontario Lawyers Weekly, 2 March 1984, p. 8.

102 32nd Parl. 1st Sess., January 27, 1981, p. 46:32.

103 Whyte, "Fundamental Freedoms", p. 458.

104 Ibid., p. 459.

105 Christian, "Section 7", p. 288.

106 J.D. Whyte, "Prostitution: Municipal Regulation and the Domain of Criminal Law Meet Again", (1983), 32 C.R. (3d) 107, at p. 114.

107 The Canadian Bill of Rights, R.S.C. 1970, Appendix III.

108 Whyte, "Fundamental Freedoms", p. 459. See Duke v. The Queen, [1972] S.C.R. 917.

109 Whyte, "Prostitution", p. 114.

110 Christian, "Section 7", p. 286.

111 Ibid., p. 288.

112 D.J. Mullan, "Fairness and Natural Justice", (1983), 4 C.R.R. 5-19, at p. 5-21.

113 (1983), 41 O.R. (2d) 43 (C.A.).

114 Ibid., p. 52.

115 Ibid.

116 Whyte, "Fundamental Freedoms", p. 467.

117 (1983), 42 O.R. (2d) 668 (H.C.J.); aff'd (1983), 44 O.R. (2d) 705 (C.A.).

118 (1983), 42 O.R. (2d) 651 (H.C.J.).

119 (1982), 70 C.C.C. (2d) 430 (Que. S.C.).

120 Ibid., p. 438.

121 (1983), 35 C.R. (3d) 393 (Ont. H.J.C.), at p. 397.

122 Numerous other cases have made the same finding, that fundamental justice is procedural only. R. v. Holman (1982), 16 M.V.R. 225 (B.C. Prov. Ct. Crim. Div.); Millar v. The Queen (1983), 36 C.R. (3d) 102 (Que. S.C.); Re Lowe and The Queen (1983), 5 C.C.C. (3d) 535 (B.C.S.C.); R. v. Konechny (1983), 6 C.C.C. (3d) 354 (B.C.Co. Ct.); R. v. Cadeddu (1982),

40 O.R. (2d) 128 (H.C.J.); Re Balderstone and The Queen, [1983] 2 C.C.C. (3d) 37 (Man. Q.B.); aff'd [1983] 3 W.W.R. 336 (C.A.); R. v. Anson, 68 C.C.C. (2d) 350 (B.C. Co. Ct.); R. v. MacIntyre, 69 C.C.C. (2d) (Alta. Q.B.).

123 (1983), 33 C.R. (3d) 22; 4 C.C.C. (3d) 243 (B.C.C.A.).

124 33 C.R. (3d), at p. 26.

125 Ibid., p. 30.

126 Professor Whyte (at p. 465) has suggested that the court properly rejected the argument that if s.94(2) violated s.7, then it was a permissible infringement under s.1 for how can a court hold that a provision is substantially unjust but demonstrably justified in a free and democratic society? Consequently, s.7 is one of the provisions in the Charter which should be applied without recourse to s.1, because the analysis of s.1 forms part of the analysis for defining principles of fundamental justice."

127 (1982), 141 D.L.R. (3d) 485; 16 M.V.R. 1 (B.C. Prov. Ct.), at p. 14.

128 Ibid., p. 13.

129 Ibid., p. 14.

130 (1983), 3 C.C.C. (3d) 198 (Ont. C.A.), at p. 200.

131 Re Potma, p. 52.

132 (1983), 47 A.R. 360 (N.W.T.S.C.).

133 Ibid., p. 362.

134 (1983), 30 C.R. (3d) 363 (Man. Prov. Ct.).

135 (1982), 1 C.R.R. 186; aff'd 2 C.R.R. 166 (Que S.C.).

136 Hayden, 30 C.R. (3d), at p. 365.

137 (1983), 22 M.V.R. 179 (B.C. Prov. Ct.).

138 Ibid., p. 184.

139 (1982), 143 D.L.R. (3d) 491; 1 C.C.C. (3d) 470 (B.C.S.C.), at p. 474.

140 Whyte, "Fundamental Freedoms", p. 468.

141 (1983), 6 C.C.C. (3d) 331 (B.C. Prov. Ct.), at p. 354.

142 Operation Dismantle Inc. v. Government of Canada (1984), 49 N.R. 363 (F.C.C.A.), at p. 386.

143 Whyte, "Fundamental Freedoms", p. 466.

144 Ibid.

145 Ibid.

146 Ibid., p. 469.

147 Ibid., p. 470.

148 Mullan, "Fairness", p. 5-23.

149 Whyte, "Fundamental Freedoms", p. 471.

150 See Christian, "Limitation of Liberty", pp. 116-121. and the cases below.
Reference re Anti-Inflation Act (1976), 68 D.L.R. (3d) 452 (S.C.C.).
Reference re Legislative Authority of Parliament to Alter or Replace the Senate (1979), 102 D.L.R. (3d) 1 (S.C.C.).
Re Residential Tenancies Act of Ontario, [1981] 1 S.C.R. 714.
R. v. Stevenson & McLean (1980), 57 C.C.C. (2d) 526 (Ont. C.A.)
R. v. Vasil (1981), 58 C.C.C. (2d) 97 (S.C.C.).

151 Christian, "Limitation of Liberty", p. 121.

152 Annotation by Don Stuart at p. 23 of Reference Re Section 94(2) (1983), 33 C.R. (3d) 22.

153 Christian, "Section 7", p. 292.

154 Ibid.

155 P. Garant, "Fundamental Freedoms and Natural

Justice", in The Canadian Charter of Rights and Freedoms - Commentary, ed. W.S. Tarnopolsky & G.-A. Beaudoin (Toronto: Carswell Co. Ltd., 1982), p. 285.

156 Ibid., p. 286.

157 Ibid., p. 288.

158 Ibid.

159 Christian, "Section 7", pp. 297-298.

160 Ibid., p. 294.

161 Ibid., p. 295.

162 Bill C-20, s.15 proposes to give the Governor in Council power to issue legally binding directives.

163 Toronto Globe and Mail, 31 July 1984, p. 8.

164 C.C. Johnston, The Canadian Radio-television & Telecommunications Commission, Prepared for the Law Reform Commission of Canada (Ottawa: Minister of Supply and Services Canada, 1980), p. 26.

165 Ibid., p. 40.

166 Ibid., p. 39.

167 A.J. Roman, "Legal Constraints on Regulatory Tribunals: Vires, Natural Justice and Fairness", (1983), 9 Queen's L.J. 35, at p. 53.

168 (1982), 45 N.R. 383 (F.C.C.A.).

169 Mullan, "Fairness", p. 5-21. Note: A recent Supreme Court of Canada decision, Township of Innisfil v. Township of Vespra (1981), 37 N.R. 43 (S.C.C.), may have signalled a change in proceedings for tribunals by imposing cross-examination into the regulatory process as a means of allowing a greater opportunity to test the evidence of adversaries. Whether this will affect all tribunals is uncertain. (See Roman, "Legal Constraints", p. 54.).

170 (1984), 44 O.R. (2d) 705 (C.A.), at p. 710. See also Re USA and Yue (1983), 42 O.R. (2d) 651

(H.C.J.) and Re Schmidt and The Queen (1983), 44 O.R. (2d) 777 (C.A.).

171 44 O.R. (2d) 705, at p. 719.

172 Ibid., p. 728.

173 (1983), 36 C.R. (3d) 102 (Que. S.C.).

174 Johnston, The CRTC, pp. 65-68.

175 Ibid., p. 74.

176 Ibid., p. 65. See s.17 of Broadcasting Act.

177 Johnston, The CRTC, p. 66. See s.16 of the Broadcasting Act.

178 Johnston, The CRTC, p. 66.

179 Ibid., p. 73.

180 [1982], 1 S.C.R. 330, at pp. 347-351.

181 (1983), 35 C.R. (3d) 393 (Ont. H.C.J.).

182 Johnston, The CRTC, p. 44.

183 Ibid., p. 96.

184 Ibid., p. 112.

CONCLUSION

This thesis has dealt with the constitutional set up for broadcasting and telecommunications in Canada; with the Governor in Council's power to review CRTC decisions and subsequent judicial review of the Governor in Council; and with the implications of the Charter on the CRTC's operations and procedures.

The constitutional question is vital, for the CRTC has become the most prominent regulator of broadcasting and telecommunications in Canada and its continued authority to act depends on it maintaining jurisdiction. From the discussion in the paper, there is little question that federal jurisdiction dominates the broadcasting scene and likely will prevail in telecommunications once the CNCP-AGT dispute is resolved by the courts.

Concern has been expressed over the Governor in Council's review power and its detrimental effect on the independence of the CRTC. Furthermore, the appeal power has been criticized as being an ineffective method for promulgating policies and unless steps are taken to account for procedural fairness, the propriety of its continued use is questioned. The direction-making power of Cabinet, provided that adequate controls are instituted to account for public interest and opinion, is not only a better mechanism for issuing policies to the

CRTC, but is not as injurious to the CRTC's independence. Consequently its use should be encouraged in place of Cabinet appeals.

Since judicial review of Cabinet decisions under the common law has only resulted in limited success, the impact of the Charter will be significant. The Charter will be used to investigate the procedural steps taken by Cabinet to ensure that fairness has been observed in the decision-making process. The legislative activities of Cabinet, which have been shielded from the evolution of "fairness", will be opened up to closer scrutiny. The Charter will challenge the virtual non-reviewability of Cabinet decisions. Even if the substance of decisions cannot be reviewed (if s.7 is found to include procedural fairness only), at least the manner of proceeding will be scrutinized, resulting in greater accountability to the public and greater protection of the public interest.

The Charter's effect on CRTC procedures and operations also has been illustrated. On the condition that the CRTC continues to employ the public hearing process to determine individual cases and discuss policy, most of its current procedures will not be found to violate the protections of the Charter because they are reasonable methods employed to carry out reasonable objectives.

With the federal government's monopolization of jurisdictional authority over communications, an accelerated use of the appeal power would be an ominous threat to the CRTC's continued independence. If the Cabinet appeal is not abolished, the Charter's scrutiny of the Cabinet appeal process will at least maintain the CRTC's powers. In addition, if Cabinet appeals become readily reviewable, the appeal power may become obsolete, for it has been the virtual non-reviewability of Cabinet decisions which has been its major strength. Therefore, the effectiveness of Cabinet appeals as a political tool will be considerably diminished.

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APPENDIX

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

32(1) This Charter applies

   (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament.

CONSTITUTION ACT, 1867

S.91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to

make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, it is hereby declared that the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated;

S.92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,-

10. Local Works and Undertakings other than such as are of the following Classes:-

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

13. Property and Civil Rights in the Province.

16. Generally all Matters of a merely local or private Nature in the Province.

S.93. In and for each Province the Legislature may exclusively make Laws in relation to Education.

BROADCASTING ACT

S.22(1) No broadcasting licence shall be issued, amended or renewed pursuant to this Part.

(a) in contravention of any direction to the Commission issued by the Governor in Council under the authority of this Act respecting

(i) the maximum number of channels... of which broadcasting licences may be issued within a geographic area...

(ii) the reservation of channels for the of the Corporation...

(iii) the classes of applicants to whom broadcasting licences may not be issued...

s.23(1) The issue, amendment or renewal by the Commission of any broadcasting licence may be set aside or may be referred back to the Commission for reconsideration and hearing by the Commission, by order of the Governor in Council made within sixty days after such issue, amendment or renewal.

S.27(1) The Governor in Council may by order from time to time issue directions to the Commission as provided for by subsection 19(2) and paragraph 22(1)(a).

NATIONAL TRANSPORTATION ACT

S.64(1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

RAILWAY ACT

S.320(2) [A]ll telegraph and telephone tolls to be charged by a company are subject to the approval of the Commission...

s.320(7) Whenever any company or any province, municipality or corporation...is desirous of using any telephone system or line owned, controlled or operated by the company, in order to connect such telephone system or line with the telephone system... for the purpose of obtaining direct communication...between any telephone or telephone exchange...and cannot agree with the company with respect to obtaining such use, connection or

communication, such first mentioned company or province, municipality or corporation may apply to the Commission for relief.

S.321(1) All tolls shall be just and reasonable and shall always...be charged equally to all persons at the same rate.

(2) A company shall not...

(a) make any unjust discrimination against any person or company;

(b) make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company...; or

(c) subject any particular person or company... to any undue or unreasonable prejudice or disadvantage.